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A Problematic Plurality Precedent: Why the Supreme Court Should Leave *Marks* over *Van Orden v. Perry*

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Note*

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Thus, we remain in Establishment Clause purgatory.[1]

I. INTRODUCTION

Nobody likes plurality decisions. Former Chief Justice Rehnquist called them "genuine misfortune[s],"[2] since they are filled with unique and ominous issues. Often arising in cases involving contentious subjects,[3] the reasoning behind these decisions' holdings by definition did not receive majority support.[4] Nevertheless, the fate of any particular plurality decision is an open question, as its initial instability does not always inhibit its ability to solidify as law. While some are discarded over time,[5] others (for better or worse) become legal mainstays.[6]

1. ACLU of Ky. v. Mercer County, 432 F.3d 624, 636 (6th Cir. 2005).
2. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).
3. They often occur "in controversial, emotionally charged areas of the law . . . , where efforts at compromise are likely to founder in the face of strongly held personal convictions." Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 759 (1980).
4. For a definition of "plurality decision" and similar terminology, see *infra* note 28.
5. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).
6. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

After the Supreme Court hands down a plurality decision, lower courts must discern its precedential value according to the *Marks* doctrine of *Marks v. United States*,[7] which states that the binding precedent of a plurality decision should be the rationale of the Justice(s) who concurred on the "narrowest grounds."[8] Despite this established method, lower courts sometimes struggle to determine and apply plurality precedents,[9] and eventually cases with similar issues climb the ranks of appellate courts. Therefore, in addition to creating plurality decisions, the Court also determines their fates, deciding whether or not to follow stare decisis in subsequent cases where the plurality precedents are applicable.[10]

The Court follows a pattern when reviewing its plurality precedents, a pattern which depends upon lower court confusion and upon the Court's own evaluation of a precedent's substantive worth.[11] When the precedent of a plurality decision has been clear to lower courts, the Court relies on the *Marks* doctrine to uphold it.[12] If, however, lower courts are split over the correct application of a plurality precedent, the Court bypasses the *Marks* doctrine to reconsider the issue in dispute.[13] In these situations, the Court frequently discards the plurality precedent in an attempt to announce a better precedent.[14] In other cases, however, the Court chooses to follow the plurality precedent's reasoning because the Court agrees with its substantive law.[15]

In the recent plurality decision of *Van Orden v. Perry*,[16] the Court decided that a long-standing government display of the Ten Commandments on the capitol grounds of Texas, which is surrounded by other historical monuments, does not violate the Establishment Clause.[17] The Court, however, was starkly divided over the issue. In fact, *Van Orden*'s plurality decision turned on the swing vote of Jus-

7. 430 U.S. 188 (1977).
8. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). For a discussion of the *Marks* doctrine, see *infra* section II.A. Terms for this doctrine, including the "*Marks* doctrine," the "*Marks* analysis," as well as terms including the "narrowest ground," will be used interchangeably in this Note.
9. *See* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1130 (1981) [hereinafter *Plurality Decisions*] (stating that some plurality decisions are "incomprehensible" to lower courts).
10. The doctrine of stare decisis urges all courts to generally follow an established principle of law in similar subsequent cases. 5 AM. JUR. 2D *Appellate Review* § 599 (2005). Of course, the Supreme Court itself is not inexorably bound to follow plurality precedents, nor any precedent for that matter. *Id.* § 600.
11. *See infra* section II.B.
12. *See infra* subsection II.B.1.
13. *See infra* subsection II.B.2.
14. *See infra* subsection II.B.2.a.
15. *See infra* subsection II.B.2.b.
16. 545 U.S. 677 (2005).
17. *Id.* at 681.

tice Breyer, whose rationale should be considered *Van Orden*'s binding precedent under the *Marks* doctrine.[18] The question that emerges is how the Court should treat this precedent in the future. Should the Court uphold *Van Orden*'s precedent under the *Marks* doctrine? If not, when the Court reconsiders the issue, should it discard or readopt the precedent's rationale? In other words, should the Court consider the precedent substantively desirable law?

This Note addresses these questions. Specifically, this Note explains why, when another government display of religion case is granted certiorari, the Supreme Court should bypass the *Marks* doctrine to reconsider *Van Orden*'s issue and why the Court should discard *Van Orden*'s plurality precedent. To appreciate why this outcome is appropriate, one must understand how plurality precedents are determined, as well as how and why the Court decides their end fates. Therefore, Part II summarizes the *Marks* doctrine and how the Court reviews its plurality precedents. Part III then discusses *Van Orden*'s plurality decision. Next, Part IV first determines *Van Orden*'s precedential opinion under the *Marks* doctrine, concluding that it is Justice Breyer's concurrence. Second, that Part details the developing circuit split in interpreting *Van Orden*'s precedent. Finally, that Part exposes the substantive problems of this precedent. Because of the developing circuit split, the Court should bypass the *Marks* doctrine to reconsider the issue.[19] Because of the precedent's substantive problems, the Court should discard it altogether.[20]

II. THE *MARKS* DOCTRINE AND SUPREME COURT TREATMENT OF PLURALITY PRECEDENTS

In determining the appropriate fate of *Van Orden v. Perry*[21] as precedent, it is necessary to understand plurality precedents' underlying procedures. First, the *Marks* doctrine is the method by which lower courts glean the precedents from plurality decisions.[22] Eventually, when a similar case reaches the Supreme Court, the Court decides to either uphold the plurality precedent under the *Marks* doctrine or bypass the *Marks* doctrine to reconsider the issue.[23] If it bypasses the *Marks* doctrine, the Court then decides either to discard the plurality precedent in favor of announcing new precedent or to independently readopt the precedent's rationale.[24]

18. *See infra* section IV.A.
19. *See infra* section IV.B.
20. *See infra* section IV.C.
21. 545 U.S. 677 (2005).
22. Marks v. United States, 430 U.S. 188 (1977).
23. *See infra* subsection II.B.1.
24. *See infra* subsection II.B.2.

A. The *Marks* Doctrine: Establishing a Plurality Precedent

The *Marks* "narrowest-grounds" doctrine is composed of two methods by which a lower court may determine the precedent of a plurality decision.[25] First, the "implicit-consensus" model seeks an underlying agreement between the plurality and concurring opinion(s).[26] When a consensus is found, the opinion adhering most closely to this limited position is considered precedent. Second, the "predictive" model essentially ascertains which opinion is the dominant second-choice winner.[27] By theorizing which opinion is the second choice of a majority of Justices, the narrowest ground emerges.

1. Origin and Application

Originally, when plurality decisions were issued only the holding was considered binding precedent.[28] As plurality decisions increased, many courts thought it necessary to give their reasoning precedential

25. Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 428–29 (1992).

26. *See infra* subsection II.A.2.a.

27. *See infra* subsection II.A.2.b.

28. Thurmon, *supra* note 25, at 428–29. Most Supreme Court decisions are decided when a majority of the Court's members agree on the proper result *and reasoning* in a given dispute. Justice Breyer notes that "[the Supreme] Court, which normally steps in where other judges disagree, decides roughly 40 percent of its cases unanimously." STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 110 (2005). This provides clear guidance to lower courts.

A plurality decision, however, is an alternative, deficient situation, wherein the "majority of the Court agrees upon the judgment but not upon a single rationale to support the result." Novak, *supra* note 3, at 756 n.1. Because of a plurality decision's fractured rationales, the Justices write several opinions. The one which receives the most votes becomes the "plurality opinion," and one which receives fewer votes becomes a "concurring opinion." For purposes of this Note, the term "plurality *decision*" refers to the entire case. A "plurality *opinion*" refers to the "opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion." BLACK'S LAW DICTIONARY 1125 (8th ed. 2004). A "concurring opinion" is an opinion which agrees with the judgment of the plurality but disagrees with its rationale. It is a "separate written opinion explaining such a vote." *Id.* at 309. The terms "plurality" and "concurrence" will also be substituted on occasion for the two above definitions.

For much of U.S. history, plurality decisions were uncommon. In fact, from the late 1800s to 1956, there were only forty-five such opinions issued. Novak, *supra* note 3, at 756 n.2. Fewer than twenty of these were before 1938. Thurmon, *supra* note 25, at 420. In the past half-century, however, plurality decisions have dramatically increased in number. Novak, *supra* note 3, at 756. Plurality decisions exemplify perhaps the most problematic feature of multimember courts: the potential for conflicting views and unclear answers. *See Plurality Decisions*, *supra* note 9, at 1130 (noting that these decisions "exhibit the tendency of some Justices to cling dogmatically to their initial views on an issue, and the concomitant inability of the Court to settle that issue with any degree of finality").

respect as well.[29] When compared with a majority decision, however, trying to interpret the law of a plurality decision "significantly increases the burden on lower courts."[30]

To ease this burden, in 1977 the Supreme Court announced a test to provide a framework for interpreting its plurality decisions in *Marks v. United States*.[31] In deciding *Marks*, the Court interpreted a plurality decision in which three rationales disagreed as to why a certain book on the life of a prostitute was not suppressible obscenity.[32] The Court declared that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'"[33]

The Court has not clarified the meaning of "narrowest grounds,"[34] but it generally refers to the rationale "most clearly tailored to the specific fact situation before the Court . . . in contrast to an opinion that takes a more absolutist position or suggests more general rules"[35] or "the rationale offered in support of the result that would affect or control the fewest cases in the future."[36] This serves to limit the holding more precisely to the facts of the case. Because of the minimal judicial agreement, the precedential reach of such cases should be limited in this way.

2. *Determining a Plurality Decision's Narrowest Ground—Two Methods*

In order to keep the plurality precedent tailored to the facts and limited in scope, lower courts primarily employ two methods to determine a plurality decision's narrowest ground under the *Marks* doctrine: (a) the implicit-consensus model and (b) the predictive model.[37]

29. Thurmon, *supra* note 25, at 448.

30. *Id.* at 427. Most courts began to consider the plurality opinion authoritative, just as they would a majority opinion. *See* Novak, *supra* note 3, at 774–75; Thurmon, *supra* note 25, at 448. Others began to search for an underlying rationale between the plurality and concurring opinions, or for a clearer explanation of the plurality's opinion as described by a concurring opinion. *See* Novak, *supra* note 3, at 774–75.

31. 430 U.S. 188 (1977).

32. *See id.*

33. *Id.* at 193. *See also* 5 AM. JUR. 2D *Appellate Review* § 602 (2005).

34. Novak, *supra* note 3, at 763; Tyson Snow, Note and Comment, *Adding* Marks *to the Mix of an Already Muddled Decision Regarding Public Forums and Freedom of Speech on the Internet*, 19 BYU J. PUB. L. 299, 304 (2004).

35. Novak, *supra* note 3, at 763.

36. Snow, *supra* note 34, at 304.

37. Thurmon, *supra* note 25, at 428–29.

a. The Implicit-Consensus Model—Finding an Underlying Agreement

The first method, dubbed the implicit-consensus model, states that although the rationales are conflicting, one of the opinions will contain an underlying thread of agreement with, or a logical connection to, the other(s).[38] When this common denominator is discovered, the opinion which holds most closely to that rationale is considered precedent.

A simple example helps to clarify. In a hypothetical plurality decision, imagine that the Court decides to uphold a statute as constitutional. The plurality finds that the statute should be upheld for two reasons, both *X* and *Y*. A concurring opinion agrees with the holding but finds that it should be upheld only for reason *Y*. Using the implicit-consensus model, it is apparent that both opinions agree that the statute should be upheld for reason *Y*. This is not true concerning reason *X*. Therefore, rationale *Y* is the common denominator, a universal underlying thread of both opinions, with which a majority of the Justices implicitly agrees. Since the concurring Justice's position endorses the narrower view of *Y* alone, his or her concurrence should receive precedential respect.[39]

b. The Predictive Model—Finding a Dominant Second Choice

The so-called predictive model is a second, more controversial method to ascertain a plurality decision's precedential value.[40] This model "is premised upon certain assumptions about how the Justices would rank the remaining opinions in the case."[41] Simply put, the precedential opinion is the one that a majority of Justices would theoretically choose as a second choice, if they were forced to decide.[42] In essence, this finds the dominant second-choice winner, which predicts

38. *See id.* at 428.

39. This hypothetical situation is based on *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), in which the plurality opinion concluded that a public indecency statute should be upheld because of the state's interest in either (i) public morality or (ii) societal order (combating negative "secondary effects" like crime, disease, and urban blight). *Id.* at 569 ("[T]he public indecency statute furthers a substantial government interest in protecting order and morality."). Justice Souter concurred in the judgment only, however, and concluded that the public indecency statute should be upheld only because of the state's interest in societal order, not public morality. *See id.* at 582. Thus, "the opinion of Justice Souter presented the narrowest resolution of the issues in *Barnes*, as the plurality opinion is broad enough to encompass the standard he articulated." Farkas v. Miller, 151 F.3d 900, 904 (8th Cir. 1998).

40. *See* Thurmon, *supra* note 25, at 428–29. Another name for this model is the "Condorcet" method. *See* Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 331 (2000).

41. Stearns, *supra* note 40, at 331.

42. *See id.*; Thurmon, *supra* note 25, at 435.

how the Court would rule in similar cases.[43] Of course, the dominant second choice of all the opinions is always on the winning result's side, since a majority of Justices agreed with that result. Likewise, it may fittingly be called the narrowest ground, as it is the least polarized of the winning rationales.

Consider another example. In a second hypothetical plurality decision, imagine that the plurality believes a statute should be upheld for reason *A* (an absolutist view). The concurrence agrees with the plurality's result but disagrees with its rationale, finding that the statute should be upheld for reason *B* (a moderate view). The dissenters disagreed with the holding, under reason *C* (an opposite absolutist view). If reasons *A* and *B* are so unrelated that they contain no underlying agreement, the implicit-consensus method cannot determine the narrowest ground between them. Using the predictive model instead, one must determine which of the two opinions that upheld the statute is the dominant second choice of a majority of the Justices. The plurality's view is absolutist, while the concurrence's view is moderate. Thus, the dissenters' second choice (after their own view) would logically be the concurrence's view, rather than the plurality's view, since it is more similar to their own. The plurality's second choice (after its own view) would logically be the concurrence's view for the same reason. As a result, rationale *B* should receive precedential respect under the predictive model.[44]

As shown in this example, it is clear that the number of Justices adhering to the narrowest rationale does not affect the precedential value ascribed to it.[45] A single Justice's rationale, even one "joined by no other Justice, [may be] nonetheless binding precedent under *Marks*."[46] Because it may lack an underlying consensus, the predictive model is a controversial method of determining a narrowest ground.[47] Even so, the Supreme Court has "dodged the question" and

43. *See* Stearns, *supra* note 40, at 331.

44. A helpful way to determine a dominant second-choice winner is "by plotting each opinion along [a] single dimension continuum." *Id.* at 327.

45. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 597 (2002) ("Over the last twenty-five years, the Supreme Court and lower courts many times have accepted as binding a single Justice's opinion deemed 'narrower' than multi-author opinions."); Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 283 (2000) ("The question of how many Justices joined a particular opinion is not dispositive of its precedential value.").

46. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

47. Snow, *supra* note 34, at 304–05. In fact, "[m]ost of the confusion surrounding the *Marks* analysis arises from [this] single question: whether the concurring opinions must share some fundamental basis or similar reasoning before being proffered as the Court's true holding." *Id.* at 304. The majority of commentators support requiring an implicit consensus. *See, e.g.*, *id.* at 305 (noting that the

"has failed to clarify the issue[ ]."[48] Thus, currently both the implicit-consensus model and the predictive model may be used to determine a plurality decision's precedential opinion.[49]

B. Supreme Court Treatment of *Marks* and Plurality Precedents

Because it is the highest court in the United States, the Supreme Court is not bound by the *Marks* doctrine, just as it is not bound to follow even majority-decided precedents.[50] Thus, "the Supreme Court regards the *Marks* rule as binding lower courts, but does not believe

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Marks analysis' "judicial politicking" can be solved by requiring an underlying consensus); Rafael A. Seminario, Comment, *The Uncertainty and Debilitation of the* Marks *Fractured Opinion Analysis—The U.S. Supreme Court Misses an Opportunity:* Grutter v. Bollinger, 2004 UTAH L. REV. 739, 761 ("[A] better term for 'narrowest grounds' should be 'common denominator' . . . ."); Novak, *supra* note 3, at 765 ("[T]here is no reason . . . to regard [second-choice] rationale[s] as binding on lower courts . . . ."). Otherwise, "*Marks* will turn a single opinion that lacks majority support into national law." King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991).

Following this train of thought, some courts, led by the District of Columbia Circuit, have refused to extend *Marks* so far. *See King*, 950 F.2d at 781 ("*Marks* is workable . . . only when one opinion is a logical subset of other, broader opinions."); Kucinich v. Bush, 236 F. Supp. 2d 1, 13 (D.D.C. 2002) ("[T]he rule in *Marks* only applies when the concurrence is implicitly in agreement with the view of a majority of justices . . . ."). The Ninth and Third Circuits have agreed with the District of Columbia Circuit's approach. *See* United States v. Rodriguez-Preciado, 399 F.3d 1118, 1140 (9th Cir. 2005); Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 170 (3d Cir.1999).

Despite the criticism, the Court has done nothing to discourage giving precedential respect to second-choice winners. Perhaps the Court is reluctant to join the criticism and require an implicit consensus because the Court itself has declared a plurality decision's dominant second-choice winner to be precedent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *See* Stearns, *supra* note 40, at 333 ("[A] majority of the Justices in *Casey* expressly or impliedly rejected the application of stare decisis as a basis for adhering to a revised rendition of *Roe*, [but] *Marks* again explains why the joint opinion remains the dominant second choice . . . winner.").

48. Snow, *supra* note 34, at 305–06. The Sixth Circuit, for example, recently supported a dominant second-choice winner. While Justice Powell's concurrence alone accepted a particular rationale, "it nevertheless possesse[d] the requisite features of a dominant second choice . . . winner." Stearns, *supra* note 40, at 330–31 (discussing the Sixth Circuit's decision in Grutter v. Bollinger, 288 F.3d 732, 741 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003)). And, upon reviewing the case, the Court did not speak against the Sixth Circuit's use of *Marks*. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (stating indifferently that the Court "do[es] not find it necessary to decide" whether the use of *Marks* was proper).

49. *See* Snow, *supra* note 34, at 304, 306 (describing the desire to require an implicit consensus but stating that "[u]fortunately, the Supreme Court[ ] . . . does nothing to clarify").

50. *See* 5 AM. JUR. 2D *Appellate Review* § 600 (2005).

that the 'narrowest grounds' doctrine can prevent the Court from reconsidering the issues it addressed in its earlier plurality decision."[51]

Over time, it has become apparent that the Court follows a pattern when reviewing its plurality precedents. When there is no lower court confusion over the correct application of the plurality decision's precedent, the Court upholds the plurality precedent under the *Marks* doctrine.[52] When there is lower court confusion, however, the Court bypasses the *Marks* doctrine to reconsider the issue.[53] In such cases, the Court then attempts to guide lower courts more successfully by either discarding the plurality precedent or readopting it, depending on its substantive worth.[54]

1. *The Court Applies the* Marks *Doctrine When There is No Lower Court Confusion*

The Court upholds a plurality decision's precedent when lower courts are clear as to which opinion is the narrowest ground and when lower courts consistently apply this narrowest ground. For example, in *O'Dell v. Netherland*,[55] the Court mechanically applied the *Marks* doctrine to uphold a plurality precedent.[56] Because the *O'Dell* Court found that there was no lower court confusion over the plurality precedent,[57] the *O'Dell* Court saw no reason to bypass the *Marks* doctrine.[58]

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51. Thurmon, *supra* note 25, at 437.

52. *See infra* notes 55–58 and accompanying text.

53. *See infra* notes 59–66 and accompanying text.

54. *See infra* notes 67–78 and accompanying text.

55. 521 U.S. 151 (1997).

56. *See id.* at 160.

57. *See* Hochschild, *supra* note 45, at 281–82 (stating that the plurality decision's "narrowest grounds were clear to both the lower courts and to the Supreme Court").

58. There are numerous examples of this principle. In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Court considered the constitutionality of a municipality's limiting private structures, such as newspaper racks, on public property. *See id.* at 754–55. The Court used a plurality precedent to demonstrate that another prior case was still good law. *See id.* at 764. Because the narrowest ground of the plurality decision under review was clear to lower courts, the Court used the *Marks* doctrine to uphold its precedent as binding law. *See id.* at 764–65 n.9 (applying the *Marks* doctrine and stating that "[c]learly, . . . the plurality opinion put forth the narrowest rationale for the Court's judgment").

Likewise, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (*Casey II*), 510 U.S. 1309 (1994), the Court "employed the *Marks* test, citing its application in the 1992 version of . . . *Casey* [*I*]." Hochschild, *supra* note 45, at 280. In this application, there was no circuit split because the dispute was simply a continuation of the initial suit upon remand. *Casey II*, 510 U.S. at 1309–10. There was not enough time for a circuit split to develop. As a result, the Court utilized *Marks*.

2. *The Court Bypasses the* Marks *Doctrine When There is Lower Court Confusion*

The Court, however, chooses to bypass the *Marks* doctrine when there is lower court confusion over which opinion is precedent or over how to apply that precedent.[59] This way the Court can reconsider the issue and give better guidance to lower courts.

In *Nichols v. United States*,[60] for example, the Court reviewed a plurality precedent while deciding sentencing considerations for defendants with previous uncounseled convictions.[61] Instead of upholding the plurality precedent under the *Marks* doctrine, however, the *Nichols* Court reconsidered the issue[62] because it found that a circuit split had developed over which opinion was precedent.[63] The *Nichols* Court stated that it is "not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it."[64]

Thus, when bypassing the *Marks* doctrine and reconsidering the issue, the Court may either discard the plurality precedent or independently follow its rationale.[65] This question turns on whether or not the Justices agree with the plurality precedent's substantive law.[66]

a. Discarding the Plurality Precedent

When the current members of the Court are not convinced that the plurality precedent is desirable substantive law, they discard it.[67] After the Court in *Nichols v. United States*[68] bypassed the *Marks* doctrine, it aligned itself with the plurality decision's dissenters and

59. *See, e.g.*, Nichols v. United States, 511 U.S. 738 (1994).
60. *Id.*
61. *See id.* at 740, 749.
62. *See id.* at 745–46. The Court found that the "degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision." *Id.* at 746.
63. *See id.* at 745 (comparing, for example, Santillanes v. U.S. Parole Comm'n, 754 F.2d 887 (10th Cir. 1985), which concluded that Justice Blackmun's rationale was the narrowest ground, with United States v. Williams, 891 F.2d 212 (9th Cir. 1989), which concluded that Justice Marshall's opinion is the closest to a narrowest ground, with United States v. Castro-Vega, 945 F.2d 496 (2d Cir. 1991), which concluded that the plurality decision contained no narrowest ground); *see also* Thurmon, *supra* note 25, at 437 ("The [*Nichols*] Court noted that the circuits were split regarding the proper application of the [narrowest grounds] test.").
64. *Nichols*, 511 U.S. at 745–46. For more examples of this principle, see *supra* notes 71, 78.
65. *See supra* subsections II.B.2.a–b.
66. *See supra* subsections II.B.2.a–b.
67. *See, e.g.*, *Nichols*, 511 U.S. 738.
68. *Id.*

discarded the plurality precedent.[69] Thus, because the *Nichols* Court found the plurality precedent to be undesirable substantive law,[70] it opted to announce a better precedent.[71]

b. Readopting the Plurality Precedent

If the Court agrees with the plurality precedent, however, it readopts the precedent's rationale, finding it to be desirable substantive

69. *See id.* at 746, 748 (stating the Court overrules the plurality precedent and adheres to a prior holding with which the plurality decision's dissenters agreed).

70. For purposes of this Note, the desirability of substantive law encompasses both a Justice's preference for what he or she believes would promote positive jurisprudence, as well as his or her opinion of the valid constitutional or statutory interpretation. It encompasses both judicial preference and judicial philosophy. In constitutional cases, the line between these two concepts, judicial preference and judicial interpretation, is nearly lost because of the pervasiveness of substantive reasoning. For a discussion tying substantive reasoning to the increase in plurality decisions, see *Plurality Decisions*, *supra* note 9, at 1140–44.

71. There are numerous examples of this principle. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court considered a plurality decision while determining whether or not the State of Florida could be haled into court over its failure to negotiate compacts with Native American gaming organizations pursuant to federal law. *See id.* at 51–52, 61. The Court stated, however, that the plurality precedent had caused lower court confusion, and as a result, it did not apply the *Marks* doctrine. *See id.* at 64 (stating that "[the plurality precedent] has created confusion among the lower courts"). After bypassing the *Marks* doctrine, the Court discarded the plurality precedent because it disagreed with its rationale. *See id.* at 66 ("We feel bound to conclude that [the plurality precedent] was wrongly decided and that it should be . . . overruled.").

Likewise, consider the Court's recent *Marks*-related decision, *Vieth v. Jubelirer*, 541 U.S. 267 (2004), which is also unfortunately a plurality decision. A plurality of the *Vieth* Court first noted that a plurality precedent had caused lower court inconsistencies. *Id.* at 282 (plurality opinion) (providing case examples and stating that "[i]n the lower courts, the legacy of the plurality's test is one long record of puzzlement and consternation"). The plurality then independently reconsidered the issue and discarded the plurality precedent because it was considered poor substantive law. *See id.* at 305–06 (finding the plurality precedent unmanageable in application and preferring to overrule it).

Justice Kennedy's concurrence is *Vieth*'s narrowest ground, since his position (i.e., that only *some* political gerrymandering claims are justicable) is narrower than the plurality's position (i.e., *no* political gerrymandering claims are justicable). *See id.* at 302 (plurality opinion) ("Justice Kennedy asserts that to declare [complete] nonjusticiability would be incautious."). Justice Kennedy also noted how unworkable the plurality precedent has been to lower courts. *See id.* at 308 (Kennedy, J., concurring in the judgment) (admitting that prior standards are "unmanageable or inconsistent with precedent, or both"). Thus, he would not renew the precedent. While he thought that the plurality decision was correctly decided, *see id.* at 327 ("In my judgment, the [plurality precedent] was correct . . . ."), he did not readopt the precedent's position exactly, because he thought a better substantive approach was available. *See id.* at 339 ("In sum, . . . I would apply the standard set forth in the *Shaw* cases . . . ."). Thus, both the plurality and the concurrence reconsidered and discarded the plurality precedent in pursuit of a better precedent.

law.[72] In *Grutter v. Bollinger*,[73] for example, the Court opted to bypass the *Marks* doctrine and reconsider the constitutionality of using race in college admissions decisions.[74] The *Grutter* Court, however, did not overrule the plurality precedent, as in *Nichols*, but instead readopted the plurality precedent's rationale.[75] As it readopted this rationale, the *Grutter* Court noted that it was "basing its decision on independent reasons,"[76] not out of respect for the plurality precedent. Because the *Grutter* Court considered it to be substantively desirable, the Court independently readopted the same rationale that the *Marks* doctrine had established.[77] In essence, this option transforms the plurality precedent into majority precedent.[78]

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72. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).
73. *Id.*
74. *See id.*
75. *See id.* at 325.
76. Seminario, *supra* note 47, at 756.
77. *Id.* at 755–56.
78. There are numerous examples of this principle as well. The Court, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), noted that interpreting a plurality decision caused confusion among lower courts over the issue of how local ordinances may restrict the operation of sexually oriented businesses. Aaron Brogdon, Note and Comment, *Improper Application of First-Amendment Scrutiny to Conduct-Based Public Nudity Laws:* City of Erie v. Pap's A.M. *Perpetuates the Confusion Created by* Barnes v. Glen Theatre, Inc., 17 BYU J. PUB. L. 89, 97–98 (2002) ("[The] clear split among the circuit and district courts exemplifies the confusion that was created by the plurality decision . . . ."). Thus, the *Erie* Court bypassed *Marks* to reconsider the issue. When the Court did so, it independently readopted the "secondary effects" language of the plurality decision's narrowest ground. *See* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1271 (2004) ("[A] majority of the [*Erie*] Court came around to Justice Souter's position . . . ."); Brandon K. Lemley, *Effectuating Censorship: Civic Republicanism and the Secondary Effects Doctrine*, 35 J. MARSHALL L. REV. 189, 214 (2002) (stating that the *Erie* Court "validated a . . . regulation based on the secondary effects doctrine"); Jerrold J. Kippen, Note, *Sexually Explicit Speech*, 28 HASTINGS CONST. L.Q. 799, 822 (2001) (stating that the *Erie* Court's analysis "adopted Justice Souter's secondary effects analysis"). Besides the "secondary effects" portion, however, the Justices could not otherwise agree on a rationale which would be substantively desirable, and consequently, a plurality decision again emerged. *See City of Erie*, 529 U.S. at 562; Kippen, *supra*, at 822 ("Despite the fact that the *Erie* ordinance was virtually identical to that found in the *Barnes* case, the Court's holding was again fragmented, yet the Justices' opinions were substantially different.").

Both the principle in *Nichols* and the principle in *Grutter* took place in *Horton v. California*, 496 U.S. 128 (1990). The Court was confronted with two past plurality precedents. The *Horton* Court reviewed the "inadvertence" requirement for police officers' seizures of evidence under the "plain-view" exception. *Id.* First, the Court noted that there was lower court confusion regarding the correct interpretation of the plurality precedents. *Id.* at 132 (stating that the Court granted certiorari partly "[b]ecause the California courts' interpretation of the 'plain-view' doctrine conflicts with the view of other courts"). Consequently, the *Horton* Court then bypassed the *Marks* analysis regarding both plurality precedents and independently reconsidered the issue. It concluded that the "inadvertence" require-

III. *VAN ORDEN V. PERRY*

Van Orden v. Perry,[79] in a plurality decision, announced the constitutionality of a long-standing Ten Commandments display that was surrounded by numerous other monuments on the state capitol grounds of Texas.

A. The Facts

Visitors to the capitol of Texas are able to take tours through the capitol building and grounds.[80] A guided tour includes "numerous memorials, plaques, and seals portraying both the religious and secular history of Texas."[81] On the north side of the capitol building sits a granite monolith of the Ten Commandments, which stands over six feet high and over three feet wide.[82] It is situated alongside six other monuments on the northwest quadrant, for a total of eighteen monuments on the twenty-two acres of state capitol grounds.[83] Across the top of the monolith, above the text, is an eagle grasping the American flag, a human eye inside a pyramid (much like the picture on the back of a one-dollar bill), and two small tablets with ancient-looking scripts.[84] Across the bottom, below the text, are two Stars of David and the superimposed Greek letters chi and rho, which were used by Christians in the first century to represent Christ.[85] The text itself is a nonsectarian version of the Ten Commandments.[86]

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ment should be rejected entirely, finding it substantively desirable to discard the plurality precedent that opposed this outcome while independently readopting the plurality precedent that affirmed this outcome. *See id.* at 132–42.

79. 545 U.S. 677 (2005) (plurality decision).

80. *See* Greg Abbott, *Acknowledgement Without Endorsement: Defending the Ten Commandments*, 9 TEX. REV. L. & POL. 229, 237 (2005).

81. *Id.* at 237–38.

82. *Van Orden*, 545 U.S. at 681.

83. *See id.*; Van Orden v. Perry, No. A-01-CA-833-H, 2002 WL 32737462, at *1 (W.D. Tex Oct. 2, 2002) (mem.). The monuments near the one at issue are "a tribute to Texas children, a tribute to the Texas pioneer woman, a replica of the Statue of Liberty, a memorial to the veterans of Pearl Harbor, a memorial to the Korean War veterans, and a memorial to the soldiers of World War I." *Id.* at *1 n.1. All of the monuments on the state grounds are said by the state legislature to be intended to "commemorat[e] the 'people, ideals, and events that compose Texas identity.'" *Van Orden*, 545 U.S. at 681.

84. *Van Orden*, 545 U.S. at 681.

85. *Van Orden*, 2002 WL 32737462, at *1.

86. *See* Calvin Massey, *The Political Marketplace of Religion*, 57 HASTINGS L.J. 1, 23 (2005). A nonsectarian version is an amalgam of the three main versions of the Ten Commandments, those used by Protestants, Catholics and Lutherans, and Jews. *See generally* David C. Pollack, Note, *Writing on the Wall of Separation: Understanding the Public Posting of Religious Duties and Sectarian Versions of Sacred Texts as an Establishment Claus Violation in Ten Commandments Cases*, 31 FORDHAM URB. L.J. 1363 (2004). Also, the differences can be compared in the Scripture references of "Exodus 20:2–17, Exodus 34:12–26, and Deuteronomy

"Just below the text of the commandments, offset in a decorative, scroll-shaped box, the monument bears the inscription: 'Presented to the People and Youth of Texas By The Fraternal Order of Eagles of Texas 1961.'"[87] This gift by the Fraternal Order of Eagles (FOE) was common to the time period. In the 1950s and early 1960s, the FOE, a national social, civic, and patriotic organization, "launched a project of donating granite monuments similar to the one in issue here to states, counties, and cities all over the United States."[88] All across the country such monuments were accepted by governmental entities, and Texas accepted this one by a joint resolution of the House and Senate in 1961.[89] There is no reference to anything religious, including clergy participation, in the legislative records of deliberations or the dedication ceremony.[90]

The plaintiff, Thomas Van Orden, is a law graduate of Southern Methodist University, although he no longer possesses a valid license to practice law.[91] "Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued numerous state officials in their official capacities . . . seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal."[92] He testified that the monument is offensive to him as an atheist and that it constitutes favoritism of the Christian and Jewish religions.[93] He also argued that Texas accepted the monument "for the purpose of promot-

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5:6–21." Massey, *supra*, at 54. The Fraternal Order of Eagles created nonsectarian versions of the Ten Commandments, which contain eleven or twelve Commandments, in an effort to remain neutral. Pollack, *supra*, at 1376. The one at issue reads:

> I AM the LORD thy God.
> Thou shalt have no other gods before me.
> Thou shalt not make to thyself any graven images.
> Thou shalt not take the Name of the Lord thy God in vain.
> Remember the Sabbath day, to keep it holy.
> Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
> Thou shalt not kill.
> Thou shalt not commit adultery.
> Thou shalt not steal.
> Thou shalt not bear false witness against thy neighbor.
> Thou shalt not covet thy neighbor's house.
> Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

Van Orden, 545 U.S. at 707 (Stevens, J., dissenting) (internal quotation marks omitted).

87. Van Orden v. Perry, 351 F.3d 173, 176 (5th Cir. 2003).
88. *Van Orden*, 2002 WL 32737462, at *1.
89. *See Van Orden*, 351 F.3d at 176.
90. *See* Abbott, *supra* note 80, at 242.
91. *See Van Orden*, 545 U.S. at 682.
92. *Id.*
93. *See Van Orden*, 2002 WL 32737462, at *1.

ing the Commandments as a personal code of conduct for youth[s] and because the Commandments are a sectarian religious code."[94]

B. The Plurality Decision

After a bench trial, the United States District Court for the Western District of Texas found for the defendants, concluding that the state had a proper secular purpose in recognizing the FOE's contributions in combating juvenile delinquency and that a reasonable observer would not perceive the monument as an endorsement of religion.[95] The Fifth Circuit affirmed, satisfied by the state's stated purpose in recognizing the civic contributions of the FOE and a lack of contrary evidence.[96] It also concluded that a reasonable person touring the capitol and its grounds, informed of the display's history and placement, would conclude that the state was endorsing a secular message, not a religious message, in the decalogue.[97]

The Supreme Court granted certiorari[98] and also affirmed.[99] A majority of the Court, however, agreed only upon the judgment. The four-Justice plurality was composed of Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia.[100] Justice Breyer provided the fifth vote, but concurred only in the judgment.[101] The remaining four Justices (Stevens, Ginsburg, Souter, and O'Connor) dissented.[102]

Two views, one for constitutionality and the other for unconstitutionality, dominated *Van Orden*'s plurality decision. The plurality opinion of four Justices, authored by Chief Justice Rehnquist, rejected the application of the *Lemon* test[103] as modified by the endorsement test,[104] stating that it is "not useful in dealing with [this] sort of . . .

94. Van Orden v. Perry, 351 F.3d 173, 176 (5th Cir. 2003) (internal quotation marks omitted).
95. *Van Orden*, 545 U.S. at 682. The district court also humorously (and unsympathetically) noted the irony of the atheist plaintiff's "prayer" for relief. *Van Orden*, 2002 WL 32737462, at *1 n.2.
96. *Van Orden*, 351 F.3d at 180.
97. *Id.* at 182.
98. Van Orden v. Perry, 543 U.S. 923 (2004) (mem.).
99. *Van Orden*, 545 U.S. at 692 (plurality decision).
100. *See id.* at 680.
101. *See id.* at 698.
102. *See id.* at 707, 737.
103. The "*Lemon* test" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), established a three-prong approach to deciding government issues involving religion: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." Susanna Dokupil, *"Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays*, 28 HARV. J.L. & PUB. POL'Y 609, 620 n.63 (2005) (internal quotation marks omitted) (quoting *Lemon*, 403 U.S. at 612–13).
104. Justice O'Connor's "endorsement test," articulated in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), is composed of two ques-

monument."[105] It rejected the alleged violation of the Establishment Clause for two primary reasons: because the "passive" text of the display makes a permissible acknowledgment of religion, i.e., it does not demand that people assent to it; and because the display contains "dual significance," i.e., it partakes of both religion and government without a "plainly religious" purpose.[106] The plurality even commented in dicta that the Establishment Clause does not "bar[ ] any and all governmental preference for religion over irreligion."[107] Neither is it the government's place to "'throw its weight against efforts to widen the effective scope of religious influence.'"[108] As well as joining the plurality, both Justice Thomas and Justice Scalia wrote separately to expand on their own more restrictive views of the Establishment Clause.[109]

In contrast, the dissenters desired to maintain "wholesome 'neutrality'" through strict separationism and the traditional *Lemon*/endorsement test.[110] This group of four Justices would require a formidable presumption of unconstitutionality unless a predominately secular purpose is unmistakably shown.[111] This standard is difficult, if not impossible, to meet in such cases, since the text of the Ten Commandments conveys a "profoundly sacred message."[112] Justice Ste-

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tions: "Is the purpose of the program to endorse religion," and "[d]oes the program actually convey a message of endorsement?" Adam M. Conrad, Note, *Hanging the Ten Commandments on the Wall Separating Church and State: Toward a New Establishment Clause Jurisprudence*, 38 GA. L. REV. 1329, 1341 (2004). Under this approach, a hypothetical "reasonable observer," who is "deemed aware of the history and context of the community and forum in which the religious display appears," must determine whether or not a message of endorsement is conveyed. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

105. *Van Orden*, 545 U.S. at 686 (plurality opinion).

106. *Id.* at 691 n.11, 692.

107. *Id.* at 684 n.3.

108. *Id.* at 684 (quoting Zorach v. Clausen, 343 U.S. 306, 313–14 (1952)).

109. *See id.* at 692 (Scalia, J., concurring); *id.* (Thomas, J., concurring). Justice Thomas does not believe the Establishment Clause should have been incorporated against the states by the Fourteenth Amendment, and even if it should have been, there is no establishment in the instant case because there is no actual "legal coercion." *Id.* at 693. Justice Scalia believes the Court need go no further than recognize that Texas may "favor[ ] religion generally." *Id.* at 692 (Scalia, J., concurring).

110. *See id.* at 708 (Stevens, J., dissenting) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)); *id.* at 737 (Souter, J., dissenting). *See also* ACLU of Ky. v. Mercer County, 432 F.3d 624, 635–36 (6th Cir. 2005).

111. *See Van Orden*, 125 S. Ct. at 721 (Stevens, J., dissenting) (calling for "a powerful presumption of invalidity"); *id.* at 737 (Souter, J., dissenting) (arguing that, while it is possible such displays could "be squared with neutrality," this will prove difficult, since such displays are "inherently religious"); *infra* notes 212–19 and accompanying text.

112. *Id.* at 717 (Stevens, J., dissenting).

vens and Justice Souter each provided dissenting opinions, while they both, along with Justice Ginsburg, joined each other's.[113] Justice O'Connor joined Justice Souter's dissent and referenced a prior dissent of her own.[114]

Justice Breyer provided the swing vote with his concurring opinion. Like the plurality, he stated that the Court should not endorse religion nor "exhibit a hostility toward religion."[115] Therefore, Justice Breyer utilized a contextual approach which focused on whether or not the text produced a predominately secular message.[116] To decipher this, he proposed to abandon the use of any traditional Court tests because he felt there is "no test-related substitute for the exercise of legal judgment."[117] Instead, he dwelt on how the display has not caused enmity (in the form of lawsuits) over a long period of time, which showed that a reasonable observer would not view the display as an establishment of religion.[118] In such a "borderline" case,[119] he found this factor to be "determinative,"[120] but he could not join with the plurality because of its general friendliness to religion.[121]

Also unlike the plurality, his judgment was formed by considering the basic purposes of the Religion Clause and the foreseeable consequences of his decision, instead of the relevant text and our nation's history.[122] His overarching concerns were the practical consequences of the decision[123] and how the Court could prevent social divisive-

113. *See id.* at 707, 737.

114. *See id.* at 737 (O'Connor, J., dissenting).

115. *Id.* at 704 (Breyer, J., concurring in the judgment).

116. *See id.* at 701–02.

117. *Id.* at 700. Justice Breyer relies "less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves." *Id.* at 703–04.

118. *See id.* at 702–03. This idea will be referred to as Justice Breyer's "grandfather clause" factor in this Note. *See infra* subsection IV.C.3.

119. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

120. *Id.* at 702.

121. *See id.* at 703–04.

122. *See id.* Justice Breyer wishes that judges would "emphasize purpose and consequence" in more of their decisions. *See* BREYER, *supra* note 28, at 8. In essence, Justice Breyer sees judges as constitutional alchemists, who delicately balance gyroscopes of idealized constitutional purposes. His recent book espouses that judicial interpretation based on literal or textual understandings of the original constitution undermine the democratic process. Instead, he states, such interpretation should be based on careful judicial consideration of a dispute's consequences in light the general purposes of the Constitution. For a complete argument on his purpose-driven philosophy, generally see Justice Breyer's work, *id.*

123. Scholar and Seventh Circuit Judge Richard Posner even considers Justice Breyer the most pragmatic Justice on the Court today. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 100 (2005).

ness.[124] In his view, retracting all such displays would cause social divisiveness by encouraging lawsuits to remove all long-standing displays.[125]

IV. WHY THE SUPREME COURT SHOULD RECONSIDER AND DISCARD THE PLURALITY PRECEDENT OF *VAN ORDEN V. PERRY*

According to the Supreme Court's pattern for reviewing its plurality precedents,[126] *Van Orden v. Perry*[127] should be reconsidered and discarded when another government display of religion case is granted certiorari. First, the *Marks* doctrine is able to determine the narrowest ground of *Van Orden*'s plurality decision.[128] Lower courts, however, are struggling to understand and apply this precedent.[129] Because a circuit split is developing over *Van Orden*'s precedent,[130] the Court should bypass the *Marks* doctrine to reconsider *Van Orden*'s issue.[131] Second, because *Van Orden*'s precedent is undesirable substantive law,[132] the Court should discard its precedent instead of independently readopting it.[133]

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124. *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment); *cf. supra* note 123. Justice Breyer's "divisiveness" concept is a revitalized variation of "political divisiveness," a seldom-applied subcategory of the seldom-applied third prong of the *Lemon* test. *See* Corey D. Hinshaw, Recent Decision, *Constitutional Law—First Amendment—School Voucher Program Held Constitutional Under the Establishment Clause*, 72 MISS. L.J. 885, 894 n.32 (2002) (stating that the Court "pointed out that the 'political divisiveness' inquiry had been incorporated into the third prong of the *Lemon* test").

Political divisiveness has not been considered a major factor in many Establishment Clause cases. *See* Conrad, *supra* note 104, at 1346 ("The Court has consistently rejected adding [political divisiveness as] a fourth prong to the *Lemon* test."); Shanin Rezain, Note, County of Allegheny v. ACLU*: Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 519 (1990) ("[The] Court has not accepted political divisiveness as an independent element in determining establishment clause violations."). In fact, it has been a relevant factor in very limited circumstances, confined to "cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." Peter J. Weishaar, Comment, *School Choice Vouchers and the Establishment Clause*, 58 ALA. L. REV. 543, 549–50 (1994) (internal quotation marks omitted) (quoting Mueller v. Allen, 463 U.S. 388, 404 n.11 (1983)).

125. *See Van Orden*, 545 U.S. at 703–04 (Breyer, J., concurring in the judgment).

126. *See supra* section II.B.

127. 545 U.S. 677 (2005) (plurality decision).

128. *See infra* section IV.A.

129. *See infra* section IV.B.

130. *See infra* section IV.B.

131. *Cf. supra* subsection II.B.2.

132. *See infra* section IV.C.

133. *Cf. supra* subsection II.B.2.a.

A. *Van Orden*'s Precedential Value Under the *Marks* Doctrine

The *Marks* doctrine shows that Justice Breyer's concurrence is the correct precedential opinion of *Van Orden v. Perry*.[134] First, under the implicit-consensus model, an underlying agreement exists between the plurality opinion and the concurring opinion,[135] and Justice Breyer's concurrence is more closely bound to this consensus than the plurality. Second, Justice Breyer's opinion is also the dominant second-choice winner under the predictive model.[136]

1. The Opinions

The plurality opinion found the Ten Commandments monument constitutional because the monument's "passive" use of religious text and its "dual significance" in purpose together made a permissible acknowledgment of religion.[137] This reasoning shows deference to the Texas state legislature and to government displays of religion generally. Granting the state considerable leeway in using religious symbols, the plurality's "dual significance" language implies that "a secular purpose can redeem a religious display *even if the secular purpose is not paramount*."[138]

Justice Breyer claimed to rely on abstract "legal judgment" rather than the Court's traditional tests,[139] but he essentially applied the

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134. 545 U.S. 677 (2005) (plurality decision).

135. For a discussion of the implicit-consensus model, see *supra* subsection II.A.2.a.

136. For a discussion of the predictive model, see *supra* subsection II.A.2.b.

137. For a discussion of the plurality's opinion, see *supra* notes 103–08 and accompanying text.

138. Posner, *supra* note 123, at 100 (emphasis added).

139. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment). Justice Breyer's decision to use personal "legal judgment" instead of precedential Supreme Court tests is curious. Perhaps such casual disregard for precedent can best be understood in light of dominant contemporary legal theory:

> "Since at least the time of Holmes, lawyers and legal thinkers have scoffed at the notion that "the law" exists in any substantial sense . . . . Law is not a "brooding omnipresence in the sky." . . . Our actual practices [however] seem pervasively to presuppose some such law: our practices at least potentially might make sense on the assumption that such a law exists, and they look puzzling or awkward or embarrassing without the assumption."
>
> . . . .
>
> Similarly, we have a practice of relying upon judicial precedent (so-called *stare decisis*) . . . . That made sense in a legal system that regarded judicial opinions as "evidence" of what "the law" is. It makes no sense in a legal system that regards the judicial opinion *itself* as "the law," any more than it would make sense to bind today's legislature to the laws adopted in the past.

Antonin Scalia, *Law & Language*, FIRST THINGS, Nov. 2005, at 37, 38–39 (book review) (quoting STEVEN D. SMITH, LAW'S QUANDRY (Harvard Univ. Press

traditional endorsement test.[140] First, regarding the first question of the display's purpose, he was satisfied that "the State itself intended the . . . nonreligious aspects of the tablets' message to *predominate*."[141] He believed that "the predominant purpose of the monument *was* to convey a *secular message* about the historical ideals of Texans."[142] Thus, he did not need to reach the question implied by the plurality, i.e., whether or not a "dual significance" in purpose was secular enough to keep the monument constitutional.

The second endorsement question[143] was more difficult for Justice Breyer. He "tossed [the] factors into the decisional hopper,"[144] but he found *Van Orden*'s facts to be "borderline."[145] Thus, he used an additional factor to decide.[146] Finding that the display had gone forty years without legal challenge, Justice Breyer concluded that this fact suggested the display carried no improper effect of endorsement.[147] In the end, he found the display predominately secular.[148]

2. *The Narrowest Ground*

Under the *Marks* doctrine, the narrowest ground must be determined to discover *Van Orden*'s plurality precedent.[149] The two opinions' applied separate types of analyses, which converged on only one point—the presence of a secular purpose. To the plurality, any secular purpose would likely save the display. To Justice Breyer, there

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2004)), *available at* http://www.firstthings.com/article.php3?id_article=245&var_recherche=law+%26+language.html.

Justice Breyer well understands that stare decisis is significantly less enlightening or compelling when one adheres to an evolving Constitution of human-made principles and social constructs.

140. *See* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 502 (2005) (stating Justice Breyer used "an analysis that is functionally equivalent to the endorsement inquiry"). For a summary of the endorsement test, see *supra* note 104.

141. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment) (emphasis added).

142. Posner, *supra* note 123, at 100 (emphasis added).

143. This question is whether or not "the program actually convey[s] a message of endorsement." Conrad, *supra* note 104, at 1341.

144. Massey, *supra* note 86, at 24.

145. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

146. *Id.* at 702–03.

147. *Id.* The dissenters were not in favor of this grandfather-clause factor. *See, e.g.*, *id.* at 747 (Souter, J., dissenting) ("Suing a State over religion . . . [creates a] risk of social ostracism [that] can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause."). The plurality was not in favor of this factor either. It did mention the grandfather-clause factor in its analysis, but it simply used this to highlight how "passive" the monument's text was. *See id.* at 691 (majority opinion).

148. *Id.* at 703–04 (Breyer, J., concurring in the judgment).

149. For a discussion of the *Marks* doctrine, see *supra* section II.A.

must be a predominately secular purpose to save the display. Because the plurality's position logically includes Justice Breyer's, an implicit consensus is present on this point.

Justice Breyer's rationale included the need for a predominately secular purpose. The plurality's rationale included the need for a less stringent "dual significance," meaning any secular purpose in addition to the religious purpose. If a display is constitutional with *any* secular purpose, it is obviously constitutional with a *predominately* secular purpose. Therefore, the plurality's rationale can encompass both propositions and an implicit consensus is found.[150] Because Justice Breyer's opinion would uphold the constitutionality of fewer monuments than the plurality's, it limits *Van Orden*'s precedent more tightly to the facts of the case. As a result, Justice Breyer's concurrence is narrower and should be considered precedent under the implicit-consensus model.[151]

However, because the consensus—i.e., the presence of a secular purpose—is very limited, finding the dominant second-choice winner is also helpful in confirming the narrowest ground.[152] This is a simple process in *Van Orden* because Justice Breyer's view is easily the logical second choice of the other Justices. If the members of the plurality could not choose their own opinion, they would choose Justice Breyer's over any of the dissenters' because it is more similar to their own. If the dissenters had to choose between the plurality's or Justice Breyer's opinion, they would choose Justice Breyer's for the same reason. His view is ideologically between the others, making it the middle ground, or dominant second-choice winner.[153] Therefore, under

150. *Cf. supra* subsection II.A.2.

151. For a discussion of the implicit-consensus model, see *supra* subsection II.A.2.a.

152. For a discussion of the predictive model, see *supra* subsection II.A.2.b.

153. This analysis also explains the voting strategy of the Court's members. In contrast to Justice Breyer, Justices Thomas and Scalia joined with the plurality instead of concurring in the judgment only. At first, this seems odd because their ideal positions, as stated in their concurrences, are arguably even less similar to the plurality's than Justice Breyer's concurrence.

Justice Thomas believes that the Establishment Clause should not have been incorporated against the states, and this is a very restrictive view of the Establishment Clause. *Van Orden*, 545 U.S. at 692–98 (Thomas, J., concurring). Justice Scalia believes that the Establishment Clause does not prohibit the government from generally favoring religion, another restrictive position. *Id.* at 692 (Scalia, J., concurring).

Both Justice Thomas and Justice Scalia's ideal positions are more restrictive than the plurality's. Therefore, because the plurality is more moderate than they, there is no chance that either concurrence could become precedent as a "narrowest ground," more tightly constrained to the facts of the case. As a result, it better serves their cause to join with the plurality opinion to add strength to its position, which is the next most similar to theirs.

Oppositely, even though Justice Breyer's position is arguably more similar to the plurality's, he benefits by writing separately and not joining the plurality,

the *Marks* doctrine, Justice Breyer's opinion is the narrowest ground, and "his opinion represents the controlling rationale arising from the decision."[154]

B. The Circuit Split in Interpreting *Van Orden*'s Precedent

The first question in the Supreme Court's review of its plurality precedents is whether or not a circuit split (or other form of lower court confusion) has occurred over the precedent.[155] *Van Orden v. Perry*[156] is certain to produce a diverse split over time. In fact, it has already begun to do so among the federal courts of appeals.[157] Soon after *Van Orden* was handed down, three circuits applied *Van Orden* differently. First, the Tenth Circuit utilized Justice Breyer's contextual approach.[158] Second, the Fourth Circuit focused on Justice Breyer's grandfather-clause factor and his call for the use of judicial "legal judgment."[159] Finally, the Eighth Circuit erroneously relied on the plurality opinion.[160] Because a circuit split is developing over *Van Orden*'s plurality precedent, the Court should bypass the *Marks* doctrine to reconsider *Van Orden*'s issue.

1. *The Tenth Circuit*

The Tenth Circuit discussed *Van Orden* in *O'Connor v. Washburn University*,[161] a case with facts similar to *Van Orden*, involving an alleged government display of anti-Catholicism.[162] It held that a university did not violate the Establishment Clause[163] by including in an

since his concurrence will become precedent, as it is less polarized than any other opinion (and therefore the narrowest ground under *Marks*).

154. *The Supreme Court's Decisions on Ten Commandments Displays*, PEW FORUM ON RELIGION & PUB. LIFE, July 26, 2005, http://pewforum.org/publications/reports/TenCommandmentsDecision.pdf.

155. For a discussion of how the Court reviews its plurality precedents, see *supra* section II.B.

156. 545 U.S. 677 (2005) (plurality decision).

157. *Compare infra* subsection IV.B.1 (O'Connor v. Washburn Univ., 416 F.3d 1216 (10th Cir. 2005) (giving precedential value to Justice Breyer's contextual approach)), *with infra* subsection IV.B.2 (Myers v. Loudoun County Pub. Sch., 418 F.3d 395 (4th Cir. 2005) (giving precedential value to Justice Breyer's grandfather-clause factor)), *with infra* subsection IV.B.3 (ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772 (8th Cir. 2005) (en banc) (giving precedential value to the plurality opinion)).

158. *See Washburn Univ.*, 416 F.3d 1216. For a summary of this contextual approach, see *supra* notes 118–25, 143–48 and accompanying text.

159. *See Myers*, 418 F.3d 395. For a summary of the grandfather-clause factor, see *supra* notes 118–20, 143–48 and accompanying text.

160. *See Plattsmouth*, 419 F.3d 772. For a summary of the plurality's opinion, see *supra* notes 103–08 and accompanying text.

161. 416 F.3d 1216 (10th Cir. 2005).

162. *Id.*

163. *Id.* at 1217.

art display a sculpture "entitled *Holier Than Thou,* [which] depict[ed] a Roman Catholic bishop with a contorted facial expression and a miter that some have interpreted as a stylized representation of a phallus,"[164] which the plaintiff alleged to be state-sponsored hostility to Catholicism.

In discussing *Van Orden*, the *O'Connor* court correctly found Justice Breyer's concurrence to be its binding precedent, and it essentially gave precedential respect to Justice Breyer's general adhesion to the endorsement test.[165] Citing his concurrence repeatedly, it found *Van Orden* to "establish that an examination of . . . the particular context of the display" is necessary.[166] Consequently, as Justice Breyer required, it considered the display's constitutionality as being "heavily dependent on the specific context and content of the display."[167] Finally, the Tenth Circuit summarized its newest approach to the Establishment Clause, adding Justice Breyer's concurrence, by saying it will "apply the *Lemon* test as modified by [the] endorsement test, while remaining mindful . . . of legal judgment."[168]

2. *The Fourth Circuit*

The Fourth Circuit, in *Myers v. Loudoun County Public School*,[169] also gave precedential respect to Justice Breyer's concurrence when determining a dispute over the constitutionality of the pledge of allegiance.[170] The *Myers* Court, however, hardly mentioned Justice Breyer's contextual approach per the endorsement test.[171] Instead, it followed Justice Breyer's call for judicial "legal judgment"[172] and his use of the grandfather-clause factor.[173]

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164. *Id.* at 1219. The sculpture's caption also reads:

> The artist says, "I was brought up Catholic. I remember being 7 and going into the dark confessional booth for the first time. I knelt down, and my face was only inches from the thin screen that separated me and the one who had the power to condemn me for my evil ways. I was scared to death, for on the other side of that screen was the persona you see before you."

Id.

165. *Id.* at 1224. For a discussion of the endorsement test, see *supra* note 104.
166. *Id.* (citing Van Orden v. Perry, 545 U.S. 677, 701 (2005) (Breyer, J., concurring in the judgment)).
167. *Id.* at 1222 (citing *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment)).
168. *Id.* at 1224 (citing *Van Orden*, 545 U.S. 699–700 (Breyer, J., concurring in the judgment)). Because the facts of this case do not involve an aged display, there was no reason for the Tenth Circuit to discuss Justice Breyer's determinative grandfather-clause factor.
169. 418 F.3d 395 (4th Cir. 2005).
170. *Id.* at 408.
171. *Id.* at 405.
172. *Id.* at 402.
173. *Id.* at 408.

The *Myers* Court first voiced its "exercise of . . . legal judgment in this case."[174] Then, citing *Van Orden* among other precedents, it concluded that a lack of legal challenge over time shows that the pledge has not caused an establishment of religion.[175]

3. The Eighth Circuit

The Eighth Circuit, in *ACLU Nebraska Foundation v. City of Plattsmouth*,[176] considered a case more factually similar to *Van Orden*, which included a Ten Commandments display almost equivalent to the display in Texas.[177] Because of this, the en banc court found *Van Orden* to be the "controlling" precedent and almost exclusively relied on it.[178] The *Plattsmouth* Court, however, did not explicitly state what precedent it gleaned from *Van Orden*. It simply marched through the opinions of both the plurality and the concurrence.[179]

Upon inspection, however, it is apparent that the Eighth Circuit, unlike the other circuits, gave the plurality opinion the most precedential respect. It primarily used the plurality opinion's "passive" monument language, concluding that "like . . . *Van Orden*, [*Plattsmouth*'s] monument has 'dual significance, partaking of both religion and government,'" and consequently "makes passive—and permissible—use of the text of the Ten Commandments to acknowledge the role of religion in our Nation's heritage."[180] The *Plattsmouth* court

174. *Id.* at 402.

175. *Id.* at 408. In this regard, the *Myers* Court also noted that no "incipient theocracy" has come about because of the "under God" passage of the Pledge. *Id.*

176. 419 F.3d 772 (8th Cir. 2005) (en banc).

177. *See id.* at 773–74. The monument in *Plattsmouth* differed from that in *Van Orden* only by being on a city park corner instead of on the state capitol grounds and by being alone instead of surrounded by other historical monuments. *See id.* at 777 n.7. For a detailed summary of the *Plattsmouth* case, see Keith T. Peters, Note, *Small Town Establishment of Religion in* ACLU of Nebraska Foundation v. City of Plattsmouth, *419 F.3d 772 (8th Cir. 2005); Eagles Soaring in the Eighth Circuit*, 84 NEB. L. REV. 997, 1017–24 (2006).

178. *See Plattsmouth*, 419 F.3d at 776 (concluding that "*Van Orden* governs our resolution of this case").

179. *See id.* at 776–77. This generality initially led some to different conclusions over which opinion the Eighth Circuit actually found controlling in *Van Orden*. *Compare* Donna Walter, *8th Circuit Ruling Allows Ten Commandments Monument to Remain in a Nebraska City Park*, ST. LOUIS DAILY REC., Aug. 25, 2005, at 1, *available at* 2005 WLNR 13517819 (quoting the city's attorney as stating that the Eighth Circuit "relied more on the four-justice plurality"), *with* Marshall H. Tanick, *"Eleven" Commandments Case Construes Court Concurrence*, MINN. LAW., Sept. 26, 2005, *available at* 2005 WLNR 15313244 (finding that "[t]he concurrence by Breyer proved to be controlling in the eyes of the 8th Circuit").

180. *Plattsmouth*, 419 F.3d at 777; *see also* Twombly v. City of Fargo, 388 F. Supp. 2d 983, 988 (D.N.D. 2005) (stating that the *Plattsmouth* Court "focused on the Chief Justice's historical analysis . . . and also examined some of the contextual factors urged by Justice Breyer").

quoted much of Justice Breyer's language as well, but relegated his determinative grandfather-clause factor to an addendum.[181]

Because the *Plattsmouth* court did not mention the *Marks* analysis, it is a mystery how it came to use the plurality's rationale as weightier precedent than Justice Breyer's concurrence.[182] The Eighth Circuit gave no explanation for the absence of the *Marks* analysis or

181. *See Plattsmouth*, 419 F.3d at 777; *see also id.* at 778 ("*Moreover*, . . . decades passed during which the . . . monument stood . . . without objection." (emphasis added)). The transitional adverb "moreover" indicates the *Plattsmouth* Court had already reached a decision without the additional bolstering point.

182. This is odd, especially in light of the time and weight given to discussing *Van Orden*'s fractured decision. *See* Thurmon, *supra* note 25, at 446 (stating that "lower courts [are] faced with the Supreme Court's rigid mandate: Thou shalt find the 'narrowest ground' in our decisions").

It is undeniable that the Eighth Circuit is well aware of the *Marks* analysis because it, like other courts, exhaustively relies on it to uncover plurality precedents. *See* United States v. Black Bear, 422 F.3d 658, 664 (8th Cir. 2005) (using *Marks* to determine a plurality precedent); *accord* United States v. Briones, 390 F.3d 610, 613–14 (8th Cir. 2004); SOB, Inc. v. County of Benton, 317 F.3d 856, 862 n.1 (8th Cir. 2003); Farkas v. Miller, 151 F.3d 900, 904 (8th Cir. 1998); United States v. Thomas, 20 F.3d 817, 823 n.4 (8th Cir. 1994); Morris v. Am. Nat'l Can Corp., 988 F.2d 50, 51 (8th Cir. 1993); Coe v. Melahn, 958 F.2d 223, 225 (8th Cir. 1992).

One possible explanation is that the Eighth Circuit did not believe that a narrowest ground was available, perhaps because the implicit consensus between the opinions was too limited. But when courts conclude this, they should not, as the Eighth Circuit did, rely on its rationale as precedent. *See, e.g.*, King v. Palmer, 950 F.2d 771, 775 (D.C. Cir. 1991). Such courts also explain why they came to the conclusion that no narrowest ground was available. They "cover their tracks" by making their valiant attempts to find a narrowest ground known. *Id.* at 782. Another possibility is that the Eighth Circuit did, in fact, believe the plurality's opinion was *Van Orden*'s narrowest ground. Yet, the question remains why the Eighth Circuit did not explain how it came to this conclusion.

There is a third explanation for the Eighth Circuit's departure, however. First, it is apparent that the Eighth Circuit is aware of the *Marks* doctrine, since it applies it often. Second, the Eighth Circuit granted petition for rehearing en banc, *Plattsmouth*, 419 F.3d at 774, before the Supreme Court had decided *Van Orden*. Thus, it is likely that the en banc court was looking to reverse the panel, which held the display unconstitutional. ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020, 1041–42 (8th Cir. 2004), *rev'd en banc*, 419 F.3d 772 (8th Cir. 2005). When the Supreme Court's Ten Commandments decisions of 2005 were handed down, the en banc Eighth Circuit, desiring as a whole to find the display constitutional, would have therefore preferred a precedent limiting the reach of the Establishment Clause. The most restrictive view that could reasonably be used as precedent was the plurality in *Van Orden*. This is basically the precedent that the Eighth Circuit applied, *see Plattsmouth*, 419 F.3d at 776–77, and the Circuit could only do so by skipping over the *Marks* doctrine.

This may be an overly skeptical and critical view of the Eighth Circuit's use of an en banc procedure, but consider the following:

> En banc rehearings now occur more frequently as Reagan-appointed majorities apparently resort to the procedure in order to reverse liberal panel decisions . . . . The confluence of bloc voting by Reagan-appointed judges to reverse liberal panels on contentious issues in several in-

why it relied on the plurality.[183] Regardless of how the Eighth Circuit came to do so, its interpretation is incompatible with that of the Tenth Circuit.[184]

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stances suggests the emergence of a trend toward the use of en banc review to advance ideological and partisan goals.

Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 873–74 (1989).

In fact, accusations of this kind have already been brought against the Eighth Circuit. *See* Robert Oliphant, *En Banc Polarization in the Eighth Circuit*, 17 WM. MITCHELL L. REV. 701 (1991) (detailing how the Eighth Circuit has used en banc proceedings to reverse liberal panel decisions). Either the Eighth Circuit did not believe there was a true narrowest ground in *Van Orden* and uncommonly decided to create one, or it avoided the *Marks* discussion to be free to use the plurality's approach.

If the latter, one cannot help but notice the irony: while upholding a display of the Ten Commandments, the *Plattsmouth* Court may have broken several Commandments in the process—"coveting" an opinion that had no place as precedent; "bearing false witness" by claiming this opinion was precedent when, in fact, it was not; failing to "honor" its parent court by not heeding the Supreme Court-instituted *Marks* doctrine. There is nothing wrong with reversing erroneous panel decisions en banc; but when doing so a circuit should properly apply Supreme Court precedent, not what it wishes Supreme Court precedent to be. Even those advocating such displays in public should be hesitant to defend an ends-justify-the-means decision.

183. "'Don't you think that any secret course is an unworthy one?'" CHARLES DICKENS, DAVID COPPERFIELD 480 (Jerome H. Buckley ed., W.W. Norton & Co. 1990) (1850).

184. Another circuit court has decided a Ten Commandments case after *Van Orden*. The Sixth Circuit mentioned *Van Orden*, but it continued to apply the *Lemon*/endorsement test regarding a new display. *See* ACLU of Ky. v. Mercer County, 432 F.3d 624, 636 (6th Cir. 2005). Yet the Sixth Circuit curiously cited the plurality's opinion considerably more often than Justice Breyer's concurrence. *See id.* at 634–36, 638–39 (over two-thirds of the references to *Van Orden* citing the plurality opinion).

District courts have also inconsistently interpreted *Van Orden*, and these differences could add to the circuit confusion in time. A district court in the Seventh Circuit has erroneously found the plurality opinion to be precedent. *See* Russelburg v. Gibson County, No. 3:03-CV-149-RLY-WGH, 2005 WL 2175527, at *1 (S.D. Ind. Sept. 7, 2005) (stating that a *Van Orden* majority mandates the use of a "passive" historical approach). A district court in the Ninth Circuit has correctly found Justice Breyer's concurrence to be precedent. *See* Card v. City of Everett, 386 F. Supp. 2d 1171, 1175 n.6 (W.D. Wash. 2005) ("Although the plurality's decision, written by Chief Justice Rehnquist, is relevant, Justice Breyer's concurring opinion guides this Court's analysis because, of the five Justices who voted to allow the continued display of the Texas monument, his opinion reflects the narrowest [ground]."). A district court in the Eighth Circuit gave Justice Breyer's approach more respect than the plurality's, even after realizing that its own circuit court did the opposite. *See Twombly*, 388 F. Supp. 2d at 988, 990 (stating that "the Eighth Circuit in *Plattsmouth* . . . focused on the Chief Justice's historical analysis" and that, "[i]n short, this Court perceives the context driven inquiry used by Justice Breyer in *Van Orden* as necessitating an inquiry into whether a reasonable observer would perceive governmental endorsement of the religious message").

C. *Van Orden*'s Substantive Problems

Once the Supreme Court bypasses the *Marks* doctrine because of *Van Orden v. Perry*'s[185] circuit confusion, the next question is whether or not the Court should consider the plurality precedent substantively desirable.[186] The Court should discard *Van Orden*'s precedent because it is undesirable substantive law. Three major issues highlight its problems: (1) the continuing uncertainty of traditional Establishment Clause tests, (2) the loneliness of the precedential view, (3) and the addition of a grandfather-clause factor.

1. The Traditional Tests—Continuing Uncertainty

It is first important to recall a paramount concern. This precedent does nothing to resolve the overarching issue of when and how to use the *Lemon* and endorsement tests.[187] Justice Breyer's apparent use of the endorsement test,[188] while at the same time denying its use in favor of "legal judgment,"[189] highlights the confusion. *Van Orden* keeps the traditional Establishment Clause tests feeble and sporadic under its plurality decision,[190] and the problem is only enhanced by Justice Breyer's addition of a nebulous new factor.[191] Certainty will have to wait, even within the variations of Ten Commandments cases.[192]

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185. 545 U.S. 677 (2005) (plurality decision).
186. *See supra* subsection II.B.2.
187. For a discussion of the *Lemon* and endorsement tests, see *supra* notes 103–04.
188. *See supra* note 140 and accompanying text.
189. *See supra* note 139 and accompanying text.
190. *Compare Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment) (stating indifferently that the display "might satisfy [*Lemon*]"), *with id.* at 686 (plurality opinion) (stating that "[*Lemon* is] not useful in dealing with the . . . monument").
191. *See infra* subsection IV.C.3.
192. *Compare Van Orden*, 545 U.S. at 686 (plurality opinion) (abandoning the *Lemon* test), *with* McCreary County v. ACLU of Ky., 545 U.S. 844, 861 (2005) (5–4 decision) (applying the *Lemon* test). *Compare McCreary County*, 545 U.S. 844 (finding courthouse display unconstitutional), *with* ACLU of Ky. v. Mercer County, 432 F.3d 624 (6th Cir. 2005) (finding equivalent courthouse display constitutional).

"[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every case." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment). Consequently, "lower courts do not have a clear, consistent test to apply in Establishment Clause cases." Joanna S. Smith, Note, *The Inherent Irony in the Courtroom—Thou Shalt Do as I Say, Not as I Do:* American Civil Liberties Union v. Ashbrook, 22 T.M. COOLEY L. REV. 55, 56 (2005). In fact, this area is "utterly standardless, and ultimate resolution depends on the shifting, subjective sensibilities of any five members of the High Court, leaving those of us who work in the vineyard without guidance." Newdow v. Cong. of the U.S., 383 F. Supp. 2d 1229, 1244 n.22 (E.D. Cal. 2005). Thus, Justice Breyer admits that "[c]ourts might have to exercise judgment in each case." BREYER, *supra* note 28, at 129.

Consequently, the federal courts of appeals are left without guidance. Part of the Supreme Court's role as the highest national court is to provide guidance for lower courts.[193] This was a major reason the Court granted *Van Orden* certiorari in the first place. Nonetheless, Justice Breyer's precedent continues present circuit splits. When "numerous inconsistencies among the lower courts" prompted a "multitude of tests . . . stemming from Supreme Court Establishment Clause cases,"[194] Justice Breyer announced that "no test" should be the solution for hard cases. And, because this avowed non-test means some general form of the endorsement test,[195] the lingering circuit debates over the extent of the knowledge of the endorsement test's reasonable observer,[196] the possible "inherent religiosity" in such displays,[197] and the "two plastic reindeer" rule[198] are continued instead of answered.

As well as failing to address the issues of present circuit splits, Justice Breyer inserted a tenuous grandfather-clause factor,[199] which, if utilized, will bring about circuit splits of its own. As discussed below, his factor erroneously relies on time without legal challenge,[200] displays geographical inconsistency,[201] includes a troublesome negative inference,[202] and proves extremely divisive for litigants.[203] In light of the continued circuit splits and these forthcoming concerns, it may legitimately be maintained that there was less room for confusion among lower courts on the day *Van Orden* was granted certiorari than on the day the decision was handed down.

It may be argued that Justice Breyer's grandfather-clause factor would create more certainty in that older displays would be considered generally constitutional while newer displays would not be. Yet, this is how the law stood previously anyway. *See* Julie Van Groningen, Note, *Thou Shalt Reasonably Focus on its Context: Analyzing Public Displays of the Ten Commandments*, 39 VAL. U. L. REV. 219, 259–66 (2004) (stating that courts may or may not find older monuments constitutional according to "context," but courts have a "very difficult time" finding newer monuments constitutional).

193. *See, e.g.*, United States v. Hamrick, 43 F.3d 877, 892 n.1 (4th Cir. 1995) (Ervin, C.J., dissenting) (commenting on the Supreme Court's "responsibility to provide guidance to lower courts"); United States v. Croxford, 324 F. Supp. 2d 1255, 1259 (D. Utah 2004) (stating that the Supreme Court had granted certiorari "to resolve a conflict among the Circuits").

194. Roxanne L. Houtman, Note, ACLU v. McCreary County*: Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 403–04 (2005).

195. *See supra* note 140 and accompanying text.

196. *See* Houtman, *supra* note 194, at 404; Groningen, *supra* note 192, at 245.

197. *See* Houtman, *supra* note 194, at 404.

198. *See id.*

199. This factor is discussed in depth *infra* subsection IV.C.3.

200. *See infra* subsection IV.C.3.a.

201. *See infra* subsection IV.C.3.b.

202. *See infra* subsection IV.C.3.c.

203. *See infra* subsection IV.C.3.d.

2. *The* Marks *Issue—A Lonely Precedential View*

The analysis of *Van Orden*'s narrowest ground yields several important observations concerning the precedential opinion. As discussed above, Justice Breyer's opinion is ideologically between the other Justices, composing the middle ground.[204] Because this middle ground is legally unwise,[205] not one other Justice agreed with either (a) Justice Breyer's view of the appropriate legal rules or (b) his application of the law to the facts. *Van Orden*, therefore, is an archetype of the *Marks* doctrine's primary problem—one Justice making binding law.[206]

a. The Legal Standard Involved

First, consider the legal standards proffered. Justice Breyer focused on the endorsement inquiry, in light of his view of constitutional divisiveness.[207] The other eight Justices disagreed and preferred an altered legal standard. The plurality preferred to require only a minor secular purpose in the display, and the dissenters preferred to apply a presumption of impermissible religiosity against the display.

The four Justices in the plurality argued for a legal standard that gives broad deference to governmental organizations to erect religious displays, allowing displays with only minor secular purposes.[208] Such entities may use religious media to "acknowledg[e] our Nation's [religious] heritage"[209] and even encourage and accommodate religious instruction.[210] This deference leans toward minimum scrutiny, as the plurality would become suspicious of only "'plainly religious,' 'pre-eminent purpose[s].'"[211]

The four dissenting Justices argued for the application of the *Lemon*/endorsement test and for stricter scrutiny of such governmental action.[212] These Justices would require a predominately secular purpose and effect to be unmistakably shown. Justices Stevens and Ginsburg argued "at the very least" for "a strong presumption against" validity.[213] While Justices Souter and O'Connor did not explicitly demand this "powerful presumption of invalidity,"[214] their analysis es-

204. *See supra* note 153 and accompanying text.
205. *See infra* subsections IV.C.2–3.d.
206. *Cf. supra* notes 46–48 and accompanying text.
207. *See supra* notes 115–25 and accompanying text.
208. *See supra* notes 137–38 and accompanying text.
209. Van Orden v. Perry, 545 U.S. 677, 683 (2005) (plurality opinion) (quoting Zorach v. Clauson, 343 U.S. 306, 313–14 (1952)).
210. *Id.*
211. *Id.* at 691 n.11 (quoting Stone v. Graham, 449 U.S. 39, 41 (1980)).
212. *See supra* notes 110–14 and accompanying text.
213. *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting).
214. *Id.* at 721.

sentially requires one.[215] Justice Sourter's dissent stated that these situations must be "closely scrutinized"[216] and that displays with the text of the Ten Commandments are "inherently religious."[217] Consequently, Texas' "problem . . . was simply that the . . . monument's inscription is there for those who walk by it [to see]."[218] In other words, a presumption of invalidity remains where a government's display of religion has perceivable religious content. This, of course, includes all FOE (and many other similar) monuments, where religious text is used. Accordingly, the dissenters disagreed with Justice Breyer on his failure to apply traditional Establishment Clause tests and on his use of mediocre scrutiny.[219]

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215. *See id.* at 737–45 (Souter, J., dissenting). Justice Breyer did state that he agreed with Justice O'Connor's statement of principles in another case. *See* Erwin Chemerinsky, *Why Justice Breyer was Wrong in* Van Orden v. Perry, 14 WM. & MARY BILL RTS. J. 1, 2 (2005). Yet, unlike Justice O'Connor, he did not want to apply the traditional tests. *See supra* note 110 and accompanying text. In addition, Justice O'Connor did not agree with Justice Breyer's use of intermediate-like scrutiny or his focus on divisiveness in *Van Orden*. *See supra* note 117; *infra* notes 216–19 and accompanying text. Thus, it can hardly be maintained that they fully agreed on the legal standard.

216. *Van Orden*, 545 U.S. at 745 n.7 (Souter, J., dissenting).

217. *Id.* at 738.

218. *Id.* at 745.

219. It has been stated that Justice Breyer in fact adopted the same legal standard as the dissenters. *See* Chemerinsky, *supra* note 215, at 2. Scholar Erwin Chemerinsky, who represented plaintiff Thomas Van Orden, mentioned that Justice Breyer "accepts the test adopted by the four dissenting justices . . . that the government may not place religious symbols on government property if they symbolically endorse religion." *Id.* This statement is true, as far as it goes, but it should not imply agreement over the legal standard involved. Such "agreement" is misleading because Justice Breyer disagreed with the dissenters in two major ways—in legal test and in legal scrutiny.

First, Justice Breyer, along with the plurality, did not agree with the dissenters that the traditional *Lemon*/endorsement test needed to be applied. *See supra* notes 110, 189 and accompanying text. Second, he also disagreed with the dissenters' legal standard regarding *scrutiny*, which deserves some discussion. The major issue between the dissenters and Justice Breyer in *Van Orden* involved the use of scrutiny, or legal presumptions. Unlike Justice Breyer, the dissenters preferred an increased level of scrutiny, which would keep a presumption of invalidity (or religiosity) in the displays. *See supra* notes 110–14 and accompanying text. Justice Breyer, on the other hand, used divisiveness as a lens for viewing his endorsement inquiry, which brought about his lesser degree of scrutiny. *See supra* notes 115–25 and accompanying text. Thus, it may be said that the dissenters preferred strict scrutiny, while Justice Breyer required only intermediate scrutiny. In fact, even the plurality may have agreed with Chemerinsky's statement. *See Van Orden*, 545 U.S. at 682 (plurality opinion) (affirming the district court and court of appeals' determinations that "a reasonable observer . . . would not conclude that . . . the State . . . endorse[d] religion"); *id.* (stating that the Establishment Clause allows "acknowledgment of our Nation's heritage" and "recogni[tion of] our religious heritage[,]" not the endorsement of religion).

If the dissenters had instead contended for the same legal standard as Justice Breyer regarding the test and scrutiny, this plurality decision would be a situa-

From these observations, the question arises: Why do the Justices disagree with Justice Breyer's preferred legal standard? The answer is that his subjective, contextual approach is precisely what has been plaguing the Court's Establishment Clause jurisprudence for decades.[220] Justice Breyer may favor this judicial power and dexterity, but others are less inclined to assume such broad command.[221] "Unfortunately, [such an approach] openly embraces detailed factual inquiries . . . , requiring examination of social context and legislative history. As Justice Kennedy noted, such an approach would lead to a 'jurisprudence of minutiae.'"[222] While the other Justices disagree on whether governmental deference or a presumption of invalidity should be applied, at least they—all eight of them—are convinced that a more objective and concrete standard is preferable.[223] Thus, no other Justice was convinced that Justice Breyer's legal standard was correct.

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tion known as a "dual majority" decision, wherein there are "two majorities: the plurality and concurrence agreeing on the result, and the concurrence and dissent agreeing on the . . . legal principles involved." Novak, *supra* note 3, at 767.

220. *See, e.g.*, Conrad, *supra* note 104, at 1358 (stating that the endorsement test involves "excessively fact-intensive inquiries"); Houtman, *supra* note 194, at 397 (stating that "in the past thirty years, the Supreme Court's Establishment Clause jurisprudence has become increasingly ambiguous" and that the Court should "rectify over thirty years of confusion and discord by clarifying [this issue]").

221. *See, e.g.*, *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring) ("The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges."); Harris v. City of Zion, 927 F.2d 1401, 1425 (7th Cir. 1991) (Easterbrook, J., dissenting) (arguing that "[l]ine drawing in this [endorsement] area will be erratic and heavily influenced by the personal views of the judges").

The current Vice President of Government Affairs for the Family Research Council stated,

> Judges are not above the law. Recent legislation seeking to rein in judicial activism is an effort to restrain judicial power within the limits of Constitutional design, not an attack on "judicial independence."
>
> Coming from a family of judges, I firmly believe in judicial independence of opinions. Nonetheless, the courts should not be allowed to operate as a legislative judiciary.
>
> . . . .
>
> Judicial independence of opinions is a sacred foundation of government, but a court system answerable to no one dangerously weakens that foundation.

Tom McClusky, *Rein in Activist Judges*, USA TODAY, Aug. 2, 2006, at 8.

222. Conrad, *supra* note 104, at 1358 (quoting County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring and dissenting)). This "jurisprudence of minutiae" forces the Court to decide cases "using little more than intuition and a tape measure." *County of Allegheny*, 492 U.S. at 675 (Kennedy, J., concurring and dissenting).

223. *See supra* notes 208–19 and accompanying text. Many lower court judges agree. *See, e.g.*, *Harris*, 927 F.2d at 1425 (Easterbrook, J., dissenting) ("We ought to use bright line rules [with the Establishment Clause] . . . ."). Likewise, many commentators also desire a more objective legal standard. *See, e.g.*, Houtman, *supra* note 194, at 427 (calling for a "bright line rule").

This is not the case with many plurality decisions, even among those whose precedent is the opinion of just one Justice. Consider the plurality decision readopted in *Grutter v. Bollinger*.[224] Justice Powell's precedential opinion actually enjoyed the agreement of a majority of Justices on the proper legal rules to be involved.[225]

b. The Application of the Facts to the Legal Standard

Likewise, eight Justices disagreed with Justice Breyer's application of the law to the facts. Neither the plurality nor the dissenters were convinced that a predominately secular purpose existed in the Texas display, as Justice Breyer was. In addition, neither the plurality nor the dissenters wanted to focus on the display's *context* as much as the display's *text*.

First, the plurality did not find Texas' display to be predominately secular. To the contrary, the plurality found "dual significance" in the Texas display.[226] And while it would not explicitly state the percentages of the display's religious significance versus its secular significance, the plurality stressed that unmistakably "religious content" is not barred by the Establishment Clause.[227] "The implication was that a secular purpose can redeem a religious display even if the secular purpose is not paramount . . . ."[228] Correspondingly, Justice Stevens lamented that the plurality's view "stands for the proposition that the Constitution permits governmental displays of sacred religious texts."[229]

The dissenters, too, disagreed with Justice Breyer, arguing that the display quite obviously fails to be predominately secular. Justice Stevens found the display to use an "explicitly religious medium"[230] to make "an official state endorsement" of religion."[231] Similarly, Justice Souter implied that the Texas display "clearly meant to convey an offi-

224. 539 U.S. 306, 314 (2003) (readopting the plurality precedent of Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)); *supra* notes 72–77.

225. Along with Justice Powell's plurality precedent, Justices Brennan, White, Marshall, and Blackmun also believed that Title VI applied, that Title VI proscribes only those racial classifications that would violate equal protection, that racial classifications call for strict scrutiny, and that achieving student diversity is a compelling interest. *Compare Bakke*, 438 U.S. at 281–320 (Justice Powell's views), *with id.* at 328–79 (the view of the four other Justices). These agreements probably contributed to the precedent being readopted.

226. *See supra* note 106 and accompanying text.

227. Van Orden v. Perry, 545 U.S. 677, 690 (2005) (plurality opinion).

228. Posner, *supra* note 123, at 100.

229. *Van Orden*, 545 U.S. at 735 (Stevens, J., dissenting).

230. *Id.* at 715.

231. *Id.* at 712.

cial religious position"[232] since "the State . . . is broadcasting the religious message."[233]

Second, both the plurality and the dissenters analyzed the facts differently than did Justice Breyer in another regard—the weight certain facts should be given. While Justice Breyer focused on the display's intricate *context*,[234] the plurality and dissenters focused on the display's *text* (the plurality in light of accomodationism,[235] the dissenters in light of separationism[236]). To eight of the nine Justices, the text was the most important issue.

Again, the question arises: Why did no other Justice agree with Justice Breyer? One answer is that the case presents such a fact-sensitive analysis that perhaps any view may be considered as correct as another.[237] The more likely answer, however, is that Justice Breyer was substantively wrong and the other Justices are correct in believing the display is not, in fact, predominately secular.[238] Indeed, they are in great agreement on the issue.[239]

Consequently, in an almost unbelievable outcome, the nearly unanimous view fails to be precedential, while the opposite view held by Justice Breyer becomes precedent. Eight of nine Justices believe that the text should be the main focus of the constitutional inquiry.[240] Eight of nine Justices believe that the display is not predominately secular.[241] Oftentimes, in plurality decisions such majority agreements would become part of an implicit consensus and be considered precedent.[242] But in the instant case, in a bizarre twist, this is prohibited: even though eight Justices agreed that the display *was not* predominately secular in context, the narrowest ground reasoning for the constitutional validation was precisely the opposite of the consensus—that the display *was* predominately secular in context. One can hardly imagine a more undesirable operation of the *Marks* doctrine.

These observations expose a disturbing feature of *Van Orden*: Justice Breyer's opinion carries precedential weight, despite being rejected in almost every regard by all the other Justices on the Court. While an imbalance in Supreme Court Justices' power has always

232. *Id.* at 745 (Souter, J., dissenting).
233. *Id.* at 740 n.3.
234. *See supra* notes 116–21 and accompanying text.
235. *See Van Orden*, 545 U.S. at 686–90 (plurality opinion).
236. *See supra* notes 212–19 and accompanying text.
237. *See supra* notes 220–22 and accompanying text. In this regard, Judge Easterbrook of the Seventh Circuit admitted that he does not "know how to determine what observers think, *if* they think at all about these [religious displays]." Harris v. City of Zion, 927 F.2d 1401, 1425 (Easterbrook, J., dissenting).
238. *See* Chemerinsky, *supra* note 215, at 5–9.
239. *See supra* notes 226–33 and accompanying text.
240. *See supra* notes 234–36 and accompanying text.
241. *See supra* notes 228–35 and accompanying text.
242. *See supra* subsection II.A.2.a.

been a concern of the *Marks* doctrine,[243] *Van Orden* pushes this concern over the edge. When the precedential view "does not in any meaningful way reflect a majority viewpoint," many believe "there is no reason . . . to regard that rationale as binding on lower courts in future cases."[244] Unfortunately, lower courts do not have the luxury of deciding otherwise.[245] As a result, the precedential portion of *Van Orden* carries the favor of just one-ninth of the Supreme Court, in both prevailing law and application.

3. *A Tenuous Grandfather-Clause Factor*

The fact that one Justice creates binding law may not automatically be a tragic event,[246] though it certainly is cause for unease. We have already seen, however, that Justice Breyer's continuation of the endorsement test will continue the same problems that have beleaguered the Court's Establishment Clause jurisprudence for decades.[247] Moreover, his precedential opinion, under the auspices of abstract "legal judgment,"[248] has only heightened the confusion.[249] Nonetheless, the greatest substantive problem with Justice Breyer's opinion is not his muddying of the already puzzling precedent; it is his announcement of a new factor.

Justice Breyer brings into the mix a tenuous grandfather-clause factor, stemming from his contextual fixation. This factor essentially states that because of a monument's previous years, it has collected enough dust, moss, and secular significance over time to pass muster under the Establishment Clause.[250] Justice Breyer considered this factor "determinative,"[251] assuring its vitality through a prominent place in his precedential opinion. Like the rest of Justice Breyer's opinion, however, this factor enjoyed the backing of no other member

243. *See supra* notes 46–47 and accompanying text; *infra* note 244.
244. Novak, *supra* note 3, at 765. In the present case, the precedential view actually represents the smallest minority viewpoint possible.
245. *See* Thurmon, *supra* note 25, at 446 (stating that "lower courts [are] faced with the Supreme Court's rigid mandate: Thou shalt find the 'narrowest ground' in our decisions").
246. Indeed, sometimes the Justices collectively turn that opinion into majority law. *See supra* subsection II.B.2.b.
247. *See supra* subsection IV.C.1.
248. *See supra* note 117.
249. *See infra* subsections IV.C.3.a–d.
250. *See Van Orden*, 545 U.S. at 703 (Breyer, J. concurring in the judgment). Generally, a grandfather clause is a "provision that creates an exemption from the law's effect for something that existed before the law's effective date." BLACK'S LAW DICTIONARY 718 (8th ed. 2004). Justice Breyer maintains that traditionally constitutional monuments may no longer be so if erected today. *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment) (noting that constitutionality in "today's world" differs from that in the past).
251. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment). *See also supra* note 120.

of the Court. Indeed, none of the Justices even found the factor worth considering.[252] Their refusal to do so is easily understood, as this factor carries a host of substantive problems. Most notable among them are (a) the consideration of time without legal challenge, (b) the geographic inconsistency, (c) the negative inference, and (d) the "divisiveness" issue.

a. Time Without Legal Challenge

Coarsely simplified, Justice Breyer concluded that, under *Van Orden*'s facts, forty years without a lawsuit confirms enough secular significance to keep a monument constitutional.[253] But is time without legal challenge an appropriate factor under the First Amendment?

The answer is clearly no, because "there is no statute of limitations for Establishment Clause claims."[254] Where a violation occurs, "it does not become permissible because it was doing this unconstitutionally for a long period of time."[255] The Court took no such notice when invalidating a "fifty-year-old statute requiring the recitation of Bible passages in public schools."[256] Even if this factor was constitutionally justified, Justice Breyer made no attempt to establish what amounts to a constitutionally material period of time. Will thirty, thirteen, or three years be enough? There is certainly room for litigation, and lower courts will probably disagree.

Likewise, a question remains whether or not the number of lawsuits (or plaintiffs) matters. Would Justice Breyer have decided *Van Orden* differently if there had been one lawsuit ten years after the monument was erected, even though the last thirty years were challenge-free? Countless variations of *Van Orden*'s facts remain a mystery. In fact, in an attempt to be truly consistent with Justice Breyer's rule, a judge may decide that one lawsuit (or one plaintiff) in a traditionally conservative town should be considered equal to multiple lawsuits (or multiple plaintiffs) in a progressively liberal city, since idealistic diversity and expectations differ by community. Or perhaps one lawsuit (or one plaintiff) in a remote area should be considered equal to multiple lawsuits (or multiple plaintiffs) in a highly populated area, since the agitated percentages of the population are more consistent.

In addition, it often takes much courage and commitment, and sometimes money, to make First Amendment challenges. Justice Souter "doubt[s] that a slow walk to the courthouse, even one that took 40

252. *See supra* note 147 and accompanying text.
253. *See supra* notes 115–25, 139–48 and accompanying text.
254. Chemerinsky, *supra* note 215, at 14.
255. *Id.*
256. *Id.* (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 240–41 (1963) (Brennan, J., concurring in the judgment)).

years, is much evidentiary help in applying the Establishment Clause."[257]

b. Geographic Inconsistency

Justice Breyer's grandfather-clause factor would lead to inconsistent applications by geographic location.[258] His concurrence wrongly assumes that people in various parts of the country react to Ten Commandments displays uniformly.

Justice Breyer stated that because "the display has stood apparently uncontested for nearly two generations," few individuals "are likely to have understood the monument as amounting . . . to a government [endorsement of religion]."[259] People in different geographic locations, however, tend to generally view such displays differently, as expectations differ by community. A plaintiff against a government display of the Ten Commandments may not be found for decades in the Dutch-Reformed corner of northwestern Iowa, while one may be found the same day or hour in the heart of Berkeley, California. If judges look to this factual question, locality becomes a major outcome indicator. Is Justice Breyer really asserting that a display may be, for example, unconstitutional on the East Coast while an equivalent display is constitutional in the Bible Belt? Although a majority of the Court has called such an occurrence "absurd,"[260] Justice Breyer's determinative factor includes this possibility.[261] The constitutionality of

257. Van Orden v. Perry, 545 U.S. 677, 747 (2005) (Souter, J., dissenting).

258. It is true some courts may not extend the *Marks* analysis to include the grandfather-clause factor, but many courts will. *See, e.g.*, Myers v. Loudoun County Pub. Sch., 418 F.3d 395, 402 n.8 (4th Cir. 2005); *supra* notes 169–75 and accompanying text; *see also supra* notes 46–48 (describing this *Marks* controversy).

259. *Van Orden*, 545 U.S. at 702–04 (Breyer, J., concurring in the judgment).

260. Zelman v. Simmons-Harris, 536 U.S. 639, 657–58 (2002) (decrying the "absurd result" that the "school-choice program might be [constitutionally] permissible in some parts of Ohio . . . but not in inner-city Cleveland," that "an identical private choice program might be constitutional in some States . . . but not in other States"). *See* Houtman, *supra* note 194, at 419 ("Even more disturbing is the fact that the very same display may be deemed an unconstitutional violation of the Establishment Clause in one court while declared constitutional in another." (citing Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom Displays of the Ten Commandments and Other Religious Texts Violate the Establishment Clause*, 39 S. TEX. L. REV. 101, 114 (1997))).

If this geographic constitutional variety is allowed to prosper, the coasts would probably attract more irreligious persons because of local governments' general preference for separationism, and the Bible Belt would probably attract more religious persons because of local governments' general preference for accomodationism. Sections of the U.S. may naturally become nesting grounds for the religious or irreligious, adding to the divisiveness Justice Breyer seeks to prevent. *See infra* subsection IV.C.3.d.

261. It may be argued this factor would only be determinative in certain "borderline" cases, such as *Myers*, 418 F.3d at 402. Even if this argument would prove true,

such displays, however, should not be subject to geographic region. It should not turn on local reaction,[262] or ever better, how a judge perceives local reaction.[263]

Strangely, Justice Breyer also seems to assume that all *actual* persons are automatically reasonable observers in the eyes of the Court, since any person could theoretically file suit against a display and potentially influence a court's decision. Experience demonstrates, however, that all *actual* observers would not properly fall into the category of the Court's hypothetical reasonable observer. There are certainly some actual persons (some plaintiffs) who should not be considered reasonable observers.

c. The Negative Inference

Another potential inconsistency emerges concerning whether or not courts will employ the negative inference of the grandfather-clause factor. Justice Breyer's factor essentially increases the deference given to government displays of religion which have been displayed for a material amount of time.[264] It is believed that time without a lawsuit strengthens the argument that no endorsement of religion has occurred, that observers must not have considered the display to be an advancement of religion. This conclusion begs the question—if a lawsuit is filed soon after a religious display is erected, does this in turn increase the suspicion of an endorsement of religion? Does this demonstrate unconstitutional divisiveness, just as time without legal challenge demonstrates constitutional permissiveness? In addition, if prompt legal challenge against new displays is a sign of unconstitutionality, displays that are challenged even before being erected would be under even stronger suspicion for unconstitutional divisiveness.

These ideas are simply the logical inverse of Justice Breyer's determinative factor. In fact, Justice Breyer is not unaware of the negative inference. He personally raises the issue and, at the very least, invites the conclusion that the inverse, too, should apply.[265] He states that "in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to

what constitutes a "borderline" case would also certainly be disputed among courts.

262. Justice Stevens concluded that the Establishment Clause "cannot be reduced to [an] exercise . . . on a slippery slope." *Van Orden*, 545 U.S. at 735 (Stevens, J., dissenting). In that regard, certainty in the law "is the difference between the shelter of a fortress and exposure to 'the winds that would blow.'" *Id.* (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

263. Recall Judge Easterbrook's statements *supra* notes 221, 237.

264. *See supra* note 250 and accompanying text.

265. *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment).

prove divisive in a way that this longstanding, pre-existing monument has not."[266] Justice Breyer's opinion means that "old monuments are more likely to be acceptable, but new construction won't be allowed."[267]

Bypassing the instant facts before the Court, Justice Breyer plainly admits that Ten Commandments displays from this date forward will probably not be constitutional, even monuments exactly like the one he is upholding, since someone will "certainly" file suit against them and show their now-unconstitutional divisiveness.[268] This obviously encourages plaintiffs to challenge displays as soon as possible, since waiting may be too late, constitutionally speaking.[269] If a vocal plaintiff is all that is necessary to put an important factor on the side of unconstitutionality, this can be easily arranged.

Furthermore, we should not be ignorant of what will take place when aging "predominately secular" monuments break or rust away. Replacements would likely be unconstitutional. The same might also be true of replacement portions or parts.[270] A slow purging of religion from the public square is still a purging; it is simply less noticeable.[271]

d. The "Divisiveness" Issue

Justice Breyer is very concerned about "divisiveness" surrounding this issue, and he sees preventing social conflict as the core importance of the Establishment Clause.[272] This concern prompted his

266. *Id.*

267. Chemerinsky, *supra* note 215, at 15.

268. *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment).

269. *See* Posner, *supra* note 123, at 100 (stating that Justice Breyer's solution "fairly invites the ACLU to sue the minute it learns of any new display of the Ten Commandments on public property").

270. Perhaps we can reach a new level of fuzzy Establishment Clause inquiry ("jurisprudence of minutiae") if, say, the new replacement parts are unconstitutional if they make up a "substantial" portion of the original whole?

271. Are we ready to concede that Ten Commandments displays were once constitutional but are so no longer? Are we ready to embrace evolving separationism as the established form of Establishment Clause interpretation? These questions are inextricably tied to Justice Breyer's new factor.

As can be seen, *Van Orden* may prove to be a wolf in sheep's clothing for those favoring public Ten Commandments displays. While conceding a few aged displays, Justice Breyer would prevent others from being erected henceforth forevermore. *See* K. Hollyn Hollman, *Making Sense of the Ten Commandments Cases*, BAPTIST JOINT COMM. FOR RELIGIOUS LIBERTY, July–Aug. 2005, http://www.bjcpa.org/resources/articles/2005/050708_hollman_t10c.htm ("While it grandfathers certain Ten Commandments displays on government property, Van Orden cannot be said to open the door to new ones."). Justice Breyer, in effect, gives a child a piece of candy while stealing her coin purse.

272. Removing these displays "could . . . create that very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (2005) (Breyer, J., concurring in the judgment) (citing Zelman v. Simmons-Harris, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting)).

judgment in *Van Orden*.[273] He believes that sweeping aged displays from the country will create social conflict, and since this is opposed to his view of the Establishment Clause's intent, it cannot be the correct constitutional answer.[274]

First, however, "divisiveness makes no sense as a principle in this area. *Any* enforcement of the Establishment Clause is inherently divisive . . . . Banning prayer and Bible-reading in public schools was, and still is, enormously divisive."[275] This may be why Justice Breyer could offer "no guidance as to how divisiveness could be applied as a First Amendment principle. How could the Court evaluate whether a particular government practice is divisive or whether stopping the government would be more divisive? Divisiveness is an empirical question, but one for which measurement never would be possible."[276]

It seems that Justice Breyer is more worried about public divisiveness against the Court than public divisiveness itself. A Court-decreed rubberstamp to remove all such monuments "faintly echo[es] . . . the campaigns of Republican Spain and the Soviet Union in the 1930s against the churches of those countries, not to mention the destruction of religious images by the Iconoclasts of eighth-century Byzantium."[277] This would certainly lead to a great public outcry, which would cause divisiveness against federal courts.[278]

Yet, Justice Breyer's method creates more public divisiveness than it saves.[279] Because of the vagueness and inconsistent application inherent in Justice Breyer's position, lawsuits will continue in great

273. BREYER, *supra* note 28, at 122 (discussing the "need to avoid a 'divisiveness based upon religion that promotes social conflict'" (quoting *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment))).

274. *See Van Orden*, 545 U.S. at 703–04 (Breyer, J., concurring in the judgment).

275. Chemerinsky, *supra* note 215, at 3.

276. *Id.* at 4.

277. Posner, *supra* note 123, at 100.

278. It should be noted that "there are [also] those who care with equal fervor about our government *staying secular*." Chermerinsky, *supra* note 215, at 3 (emphasis added).

279. This is even assuming, for argument's sake, that Justice Breyer is correct that "divisiveness" is a proper basis for, or consideration in, determining Establishment Clause issues. Professor Richard Garnett of Notre Dame also dwelt, perhaps more judiciously, on divisiveness recently:

> Few epithets in contemporary discourse are as wounding, yet tedious and vacuous, as the charge that a person, claim, argument, proposal, or belief is "divisive." The term—like "controversial," "extremist," and "partisan"—often does little more than signal the speaker's disapproval, and his desire that the offending target either be quiet or change his tune.
>
> . . . .
>
> The widely discussed and regretted divisions that run through our politics and communities make appealing to many a more managerial approach to politics and public life. But division and disagreement about important things is, this side of Heaven, a fact.

numbers.[280] The lawsuits that develop will remain constitutionally uncertain, and therefore hostile. Uncertainty seldom leads to tranquility. When the battle is uncertain, both sides keep fighting; when the battle (or the law) shows a victor, the fighting subsides. Which is likely to prove less divisive over time between the public litigants: many initial lawsuits under a precedent which clearly establishes whether or not such displays are constitutional or unconstitutional, or less (but many and ongoing) lawsuits under a precedent which unpredictably and sporadically will decide some constitutional and some unconstitutional? "Establishment Clause purgatory" can hardly be a place without substantial divisive conflict.[281] Indeed, the negative inference of Justice Breyer's factor actually encourages divisiveness by allowing lawsuits to strengthen plaintiffs' cases.[282] Perhaps this is why the public seems to be becoming more divisive after *Van Orden*.[283]

Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1723–24 (2006) (citations omitted). Garnett concluded by recalling the timely words of James Madison:

> Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

Id. at 1724 (internal quotation marks omitted) (quoting THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961)).

280. *See, e.g.*, ACLU of Ky. v. Mercer County, 432 F.3d 624, 636 (6th Cir. 2005); *see also supra* subsection IV.C.1. (explaining why there will be continued and emerging circuit splits).

281. *Mercer County*, 432 F.3d at 636. "Constitutional purgatory" is a phrase that has previously been used in the context of indefinitely detaining criminal aliens. *See generally* Kevin Costello, Comment, *Without a Country: Indefinite Detention as a Constitutional Purgatory*, 3 U. PA. J. CONST. L. 503 (2001).

282. *See supra* notes 264–69 and accompanying text.

283. *See Efforts Continue to Allow Ten Commandments Displays on Public Property*, GA. NEWS NETWORK, Jan. 31, 2006, http://www.accessnorthga.com/news/hall/newfullstory.asp?ID=100574 (noting that ACLU is still "threatening legal action" over the issue); *Ten Commandments on Private Property a Testament to Rights*, PARENT & FAMILY, Jan. 17, 2006, http://www.news-leader.com/apps/pbcs.dll/article?AID=/20060117/OPINIONS01/601170319/1091 (describing how a Missouri man is placing a fifteen-foot-tall, 22,600-pound Ten Commandments monument "on the edge of his property, right next to [a county intersection]"); Virginia Vickery, *Student: Ten Commandments Dispute Began as Assignment*, BENTON COUNTY DAILY REC., Jan. 15, 2006, http://nwanews.com/bcdr/News/30047 (stating that a local Ten Commandments lawsuit has prompted "a case of mob rule, or vigilantism [in which] [s]ome people want to grab a torch and burn down Frankensteins' windmill"); Josh Montez, *20,000 Protest Letters Delivered to ACLU Headquarters*, FOCUS ON FAM., Nov. 21, 2005, http://www.family.org/cforum/fnif/news/a0038663.cfm (noting that the "incident that pushed [a man] . . . over the edge [to help deliver 20,000 protest letters to the ACLU] was the ACLU court battle to remove the Ten Commandments displays from a small Ohio school district"); Melanie Hunter, *Most Americans Feel Religion is "Under Attack," Poll*

V. CONCLUSION

Van Orden v. Perry[284] should follow a certain path toward elimination, according to the Supreme Court's pattern for reviewing plurality precedents.[285] After applying the *Marks* doctrine, it becomes apparent that the narrowest ground of *Van Orden*'s plurality decision is Justice Breyer's concurrence.[286] Lower courts, however, are struggling to agree on *Van Orden*'s precedential value,[287] and some have not chosen the correct opinion to receive precedential respect under *Marks*.[288] Because a circuit split is developing over these matters,[289] the Supreme Court should bypass the *Marks* doctrine to reconsider *Van Orden*'s issue when the next government display of religion case is granted certiorari.[290]

In addition, because *Van Orden*'s precedent is substantively undesirable,[291] the Court should discard it altogether, instead of indepen-

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Shows, VIRTUE ONLINE, Nov. 21, 2005, http://www.virtueonline.org/portal/modules/news/article.php?storyid=3288 (stating that the "American public is starkly divided when it comes to the role of religion in the public square"); Associated Press, *Commandments Draw 300 to Okla. Courthouse*, Nov. 20, 2005, http://www.starnewsonline.com/apps/pbcs.dll/article?AID=/20051120/APA/511200615 (noting that "2,835 signatures have been collected in a petition supporting [a county's pro-monument] movement" and that "[t]he real battle is coming"); Janie Slaven, *Court Rejects $500,000 Ten Commandments Settlement*, MCCREARY COUNTY REC., Nov. 15, 2005, http://www.mccrearyrecord.com/story.asp?id=2301 (describing how Kentucky's McCreary County, the defendant in ACLU of Kentucky v. McCreary County, 125. S. Ct. 2722 (2005), rejected the ACLU's settlement offer and is ready to "fight to the end" and "take this case back to the Supreme Court" once again); *Ten Commandments Georgia Pays Off Lawsuit Debt*, MONT. NEWS ASS'N, Nov. 9, 2005, http://www.montananews.com/articles.php?mode=view&id=2897 (finding that a Georgia organization raised over $273,000 "for the legal defense of the Ten Commandments," fives times as much needed to pay its current debt).

284. 545 U.S. 677 (2005) (plurality decision).

285. *Cf. supra* section II.B.

286. *See supra* section IV.A.

287. *See supra* section IV.B.

288. *See, e.g.*, ACLU Neb. Found. v. City of Plattsmouth, 419 F.3d 772, 775–77 (8th Cir. 2005) (en banc) (giving precedential respect primarily to the plurality opinion); Russelburg v. Gibson County, No. 3:03-CV-149-RLY-WGH, 2005 WL 2175527, *1 (D. Ind. Sept. 7, 2005) (treating the plurality opinion as a majority opinion).

289. *See supra* section IV.B.

290. Considering the present confusion, *see supra* subsection IV.C.1., the sooner the better.

291. *See supra* subsections IV.C.1–3.

dently readopting it.[292] *Van Orden* provides little useful guidance for

292. Although it criticizes *Van Orden's* precedent, this Note does not present an alternative Establishment Clause analysis to flirt for judicial acceptance. In fact, it could be argued that no satisfactory method of analysis exists under contemporary jurisprudence. The root of the problem lies deeper, in modern deviations from historical jurisprudence. Justice Thomas has noted this, and he has elucidated how the Court can resolve both its "tangled web" of Establishment Clause jurisprudence, *see* Conrad, *supra* note 104, at 1360, and its constructed tensions between the Establishment Clause and Free Exercise Clause, *see* Karen T. White, *The Court-Created Conflict of the First Amendment: Marginalizing Religion and Undermining the Law*, 6 U. FLA. J.L. & PUB. POL'Y 181, 188–92 (1994).

> [T]he Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment. But the Establishment Clause is another matter.
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> . . . .
>
> Quite simply, the Establishment Clause is . . . a federalism provision—it protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand.
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> . . . .
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> . . . . As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected—state practices that pertain to "an establishment of religion."

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–51 (2004) (Thomas, J., concurring). In other words, if the First Amendment was incorporated against the states through the Fourteenth Amendment, *see* Everson v. Bd. of Educ., 330 U.S. 1 (1947), and if the Fourteenth Amendment protects what are called fundamental liberty interests, *see, e.g.*, Reno v. Flores, 507 U.S. 292, 301–02 (1993), then only the fundamental liberty interest of the First Amendment should have been incorporated. The Religion Clause's structural limitation on government, i.e., the "Congress shall make no" language in the Establishment Clause, should not have been. Incorporation of the Establishment Clause is therefore logically impossible. *See* Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1, 18 (1998); Edward S. Corwin, *The Supreme Court as a National School Board*, 14 LAW & CONT. PROB. 3, 19 (1949); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1206–07 (1990); Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 631–32 (2006); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. UNIV. L.Q. 371, 372–73; Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1708–79 (1992) [hereinafter *Rethinking the Incorporation*].

Even if the Establishment Clause remains incorporated, it could be applied more logically, i.e., when governmental activity actually coerces by threat of penalty or "infringe[s] any free-exercise rights." *See Newdow*, 542 U.S. at 49 (Thomas, J. concurring). In light of this, perhaps Justice Thomas's view of the Religion Clause should be given more consideration. Indeed, his or similar views seem to be gaining steam. *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 66 (2006) (acknowledging that "there may be functional as well as historical reasons to afford the states greater discretion to formulate religion policy" and proposing a compromised approach); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004) (arguing for decentralization in Religion

lower courts,[293] and it reflects views rejected by eight members of the Court.[294] The additional, now-precedential grandfather-clause factor illegitimately considers time without legal challenge,[295] invites geographic inconsistency,[296] includes a harmful negative inference,[297] and saves the Court from a divisive public outcry at the expense of all citizenry.[298] Such a precedent can aid neither Establishment Clause jurisprudence nor confidence in the courts generally.[299]

In recent decades, plurality precedents have shaken the consistency of constitutional law—as the constitution of the Court changes, so changes the Constitution. Hopefully, the era of plurality precedents will soon be brought to a close, allowing the issue of government displays of religion to enjoy a measure of resolution. Both before and after that day, however, Americans will most likely continue to be a

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Clause policy-making); James Campbell, Note, Newdow *Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 AKRON L. REV. 541 (2006) (advocating Justice Thomas's view); *Rethinking the Incorporation*, *supra*, at 1715–17 (advocating a federalist view and stating that the incorporated Free Exercise Clause, along with other mechanisms, adequately protects religious liberty). *But see* Steven K. Green, *Religion Clause Federalism: State Flexibility Over Religious Matters and the "One-Way Ratchet,"* 56 EMORY L.J. 107, 116 (2006) (noting, but in many ways opposing, the "recent federalism impulse"). This movement could restore historical integrity and bring clarity and consistency to the Establishment Clause.

293. *See supra* subsection IV.C.1.

294. *See supra* subsection IV.C.2.

295. *See supra* subsection IV.C.3.a.

296. *See supra* subsection IV.C.3.b.

297. *See supra* subsection IV.C.3.c.

298. *See supra* subsection IV.C.3.d.

299. Indeed, the folly of remaining in a poor precedent simply because it is precedent may be a timeless concept, being put to parabolic verse over a century ago:

> One day through the primeval wood
> A calf walked home as good calves should;
> But made a trail all bent askew,
> A crooked trail as all calves do.
> . . . .
> And men two centuries and a half
> Trod in the footsteps of that calf.
> . . . .
> They followed still his crooked way,
> And lost one hundred years a day;
> For thus such reverence is lent
> To well-established precedent.

SAM WALTER FOSS, *The Calf-Path*, *in* WHIFFS FROM WILD MEADOWS 77, 77–79 (1895).

pluralistic and "religious people,"[300] who steadfastly participate in governments "of the people, by the people, for the people."[301]

W. Jesse Weins

300. Letter from John Adams to the Officers of the First Brigade of the Third Div. of the Militia of Mass. (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS 229 (Charles Francis Adams ed., 1854).

301. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 263, 263 (1992).